Supreme Court, U.S.
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No. 15-423

IN THE
Supreme Court of the United States

BOLIVARIAN REPUBLIC OF VENEZUELA,
PETRÓLEOS DE VENEZUELA, S.A.,
and PDVSA PETRÓLEO, S.A.,

Petitioners,

v.

HELMERICH & PAYNE INTERNATIONAL DRILLING CO.,
and HELMERICH & PAYNE DE VENEZUELA, C.A.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

JOINT APPENDIX

BRUCE D. OAKLEY
HOGAN LOVELLS US LLP
700 Louisiana Street
Suite 4300
Houston, TX 77002
(713) 632-1400
bruce.oakley@hoganlovells.com

Counsel of Record
for Petitioners

DAVID W. OGDEN
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave, NW
Washington, DC 20006
(202) 663-6440
david.ogden@wilmerhale.com

Counsel of Record
for Respondents

PETITION FOR CERTIORARI FILED OCTOBER 5, 2015
CERTIORARI GRANTED JUNE 28, 2016

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* Reprinted here to correct minor typographical errors from the appendix to the petition for certiorari.

Relevant Docket Entries from the United States District Court for the District of Columbia, No. 11-cv-1735

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

No. 1:11-cv-1735

HELMERICH & PAYNE INTERNATIONAL DRILLING CO., and HELMERICH & PAYNE DE VENEZUELA, C.A.,

Plaintiffs,

v.

BOLIVARIAN REPUBLIC OF VENEZUELA, PETRÓLEOS DE VENEZUELA, S.A., and PDVSA PETRÓLEO, S.A.,

Defendants.

DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
09/23/2011	1	**COMPLAINT against BOLIVARIAN REPUBLIC OF VENEZUELA, PDVSA PETROLEO, S.A., PETROLEOS DE VENEZUELA, S.A. (Filing fee $ 350, receipt number 4616042497) filed by HELMERICH & PAYNE INTERNATIONAL DRILLING CO., HELMERICH & PAYNE**

DATE	NO.	PROCEEDINGS
		INTERNATIONAL DRILLING CO., HELMERICH & PAYNE DE VENEZUELA, C.A. (Attachments: # 1 Civil Cover Sheet)(rdj) (Entered: 09/28/2011)
08/31/2012	22	MOTION to Dismiss by PDVSA PETROLEO, S.A., PETROLEOS DE VENEZUELA, S.A. (Attachments: # 1 Memorandum in Support, # 2 Declaration —Joseph D. Pizzurro, # 3 Exhibit 1— Declaration of Valentina Morales, # 4 Exhibit —2— Declaration of Josaim Trujillo Acosta with Exhibits A—C, # 5 Exhibit —3—Declaration of Adriana Padillo Alfonso with Exhibit A, # 6 Text of Proposed Order, # 7 Certificate of Service)(Pizzurro, Joseph) (Entered: 08/31/2012)
08/31/2012	23	MOTION to Dismiss *Plaintiffs' Complaint Under Rule 12(b)(6)* by BOLIVARIAN REPUBLIC OF VENEZUELA (Attachments: # 1

DATE	NO.	PROCEEDINGS
		Memorandum in Support, # 2 Text of Proposed Order)(Oakley, Bruce) (Entered: 08/31/2012)
08/31/2012	24	MOTION to Dismiss *Plaintiffs' Complaint Pursuant to Foreign Sovereign Immunity* by BOLIVARIAN REPUBLIC OF VENEZUELA (Attachments: # 1 Memorandum in Support, # 2 Text of Proposed Order)(Oakley, Bruce) (Entered: 08/31/2012)
10/23/2012	29	WITHDRAWN (SEE ORDER 36).... MOTION to Compel by HELMERICH & PAYNE DE VENEZUELA, C.A., HELMERICH & PAYNE INTERNATIONAL DRILLING CO. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3, # 4 Exhibit 4, # 5 Exhibit 5, # 6 Exhibit 6, # 7 Exhibit 7, # 8 Exhibit 8, # 9 Exhibit 9, # 10 Text of Proposed Order)(Ogden, David) Modified on 1/14/2013 (jf,). (Entered: 10/23/2012)

DATE	NO.	PROCEEDINGS
11/21/2012	32	Memorandum in opposition to re 29 MOTION to Compel filed by BOLIVARIAN REPUBLIC OF VENEZUELA, PDVSA PETROLEO, S.A., PETROLEOS DE VENEZUELA, S.A.. (Attachments: # 1 Declaration —Second Declaration of Adriana Padilla Alfonzo, # 2 Certificate of Service)(Pizzurro, Joseph) (Entered: 11/21/2012)
12/05/2012	33	REPLY to opposition to motion re 29 MOTION to Compel filed by HELMERICH & PAYNE DE VENEZUELA, C.A., HELMERICH & PAYNE INTERNATIONAL DRILLING CO.. (Attachments: # 1 Declaration Declaration of David W. Bowker, # 2 Exhibit 1)(Ogden, David) (Entered: 12/05/2012)

DATE	NO.	PROCEEDINGS
01/10/2013	34	**STIPULATION** ***and MOTION (Joint) to Establish a Briefing Schedule for the Adjudication of Defendants' Motions to Dismiss*** **by HELMERICH & PAYNE DE VENEZUELA, C.A., HELMERICH & PAYNE INTERNATIONAL DRILLING CO.. (Ogden, David) (Entered: 01/10/2013)**
01/11/2013	36	**ORDER granting 35 Joint Motion to Establish a Briefing Schedule. It is hereby ORDERED that 29 Plaintiffs' Motion to Compel Discovery is hereby DENIED without prejudice as withdrawn, and the hearing scheduled for January 14, 2013 is hereby VACATED. The parties shall complete briefing on Defendants' Motions to Dismiss 22 23 24 in accordance with the terms of their stipulation and this Order. Plaintiffs' opposition shall be filed by no later than February 22, 2013, and Defendants' reply briefs**

DATE	NO.	PROCEEDINGS
		shall be filed by no later than March 22, 2013. (SEE ORDER FOR FULL DETAILS). Signed by Judge Robert L. Wilkins on 01/11/2013. (lcrlw3) (Entered: 01/11/2013)
02/22/2013	39	Memorandum in opposition to re 22 MOTION to Dismiss, 24 MOTION to Dismiss *Plaintiffs' Complaint Pursuant to Foreign Sovereign Immunity*, 23 MOTION to Dismiss *Plaintiffs' Complaint Under Rule 12(b)(6)* filed by HELMERICH & PAYNE DE VENEZUELA, C.A., HELMERICH & PAYNE INTERNATIONAL DRILLING CO.. (Ogden, David) (Entered: 02/22/2013)
03/22/2013	43	REPLY to opposition to motion re 22 MOTION to Dismiss filed by PDVSA PETROLEO, S.A., PETROLEOS DE VENEZUELA, S.A.. (Attachments: # 1 Certificate of

DATE	NO.	PROCEEDINGS
		Service)(Pizzurro, Joseph) (Entered: 03/22/2013)
03/22/2013	44	REPLY to opposition to motion re 23 MOTION to Dismiss *Plaintiffs' Complaint Under Rule 12(b)(6)* filed by BOLIVARIAN REPUBLIC OF VENEZUELA. (Oakley, Bruce) (Entered: 03/22/2013)
04/01/2013	45	MOTION to Enforce *the Order of the Court Ratifying the Parties' Joint Stipulation Concerning Briefing and Consideration of Defendants' Motions to Dismiss* by HELMERICH & PAYNE DE VENEZUELA, C.A., HELMERICH & PAYNE INTERNATIONAL DRILLING CO. (Attachments: # 1 Text of Proposed Order)(Ogden, David) (Entered: 04/01/2013)
04/15/2013	46	Memorandum in opposition to re 45 MOTION to Enforce *the Order of the Court Ratifying the Parties' Joint Stipulation Concerning Briefing and Consideration*

DATE	NO.	PROCEEDINGS
		of Defendants' Motions to Dismiss filed by PDVSA PETROLEO, S.A., PETROLEOS DE VENEZUELA, S.A.. (Attachments: # 1 Certificate of Service) (Pizzurro, Joseph) (Entered: 04/15/2013)
04/19/2013	48	REPLY to opposition to motion re 45 MOTION to Enforce *the Order of the Court Ratifying the Parties' Joint Stipulation Concerning Briefing and Consideration of Defendants' Motions to Dismiss* filed by HELMERICH & PAYNE DE VENEZUELA, C.A., HELMERICH & PAYNE INTERNATIONAL DRILLING CO.. (Ogden, David) (Entered: 04/19/2013)
07/15/2013		Minute Entry for proceedings held before Judge Robert L. Wilkins: Motion Hearing held on 7/15/2013 re 22 MOTION to Dismiss filed by PDVSA PETROLEO, S.A., PETROLEOS DE

DATE	NO.	PROCEEDINGS
		VENEZUELA, S.A., 24 MOTION to Dismiss Plaintiffs' Complaint Pursuant to Foreign Sovereign Immunity filed by BOLIVARIAN REPUBLIC OF VENEZUELA, 45 MOTION to Enforce the Order of the Court Ratifying the Parties' Joint Stipulation Concerning Briefing and Consideration of Defendants' Motions to Dismiss filed by HELMERICH & PAYNE DE VENEZUELA, C.A., HELMERICH & PAYNE INTERNATIONAL DRILLING CO., 23 MOTION to Dismiss Plaintiffs' Complaint Under Rule 12(b)(6) filed by BOLIVARIAN REPUBLIC OF VENEZUELA; Argument Heard and this matter is taken under advisement. (Court Reporter Bryan Wayne) (tcb) (Entered: 07/15/2013)

DATE	NO.	PROCEEDINGS
09/20/2013	55	MEMORANDUM AND OPINION re: 22 MOTION to Dismiss, 23 MOTION to Dismiss Plaintiffs' Complaint Under Rule 12(b)(6), 24 MOTION to Dismiss Plaintiffs' Complaint Pursuant to Foreign Sovereign Immunity and 45 MOTION to Enforce the Order of the Court Ratifying the Parties' Joint Stipulation Concerning Briefing and Consideration of Defendants' Motions to Dismiss. Signed by Judge Robert L. Wilkins on 9/20/2013. (tcb) (Entered: 09/20/2013)
09/20/2013	56	ORDER re: 22 MOTION to Dismiss, 23 MOTION to Dismiss Plaintiffs' Complaint Under Rule 12(b)(6), 24 MOTION to Dismiss Plaintiffs' Complaint Pursuant to Foreign Sovereign Immunity and 45 MOTION to Enforce the Order of the Court Ratifying the Parties' Joint Stipulation Concerning Briefing and

DATE	NO.	PROCEEDINGS
		Consideration of Defendants' Motions to Dismiss; Upon consideration of the parties submissions in connection with Defendants Petrleos de Venezuela, S.A. and PDVSA Petrleo, S.A.s Motion to Dismiss (Dkt. No. 22), Defendant Bolivarian Republic of Venezuelas Motions to Dismiss (Dkt. Nos. 23 & 24), and Plaintiffs Helmerich & Payne International Drilling Co. and Helmerich & Payne de Venezuela, C.A.s Motion to Enforce (Dkt. No. 45), and for the reasons set forth in the accompanying Memorandum Opinion, it is hereby, ORDERED that Defendants Motions to Dismiss (Dkt. Nos. 22, 23, and 24) are TEMPORARILY GRANTED IN PART and DENIED IN PART, and Plaintiffs Motion to Enforce (Dkt. No. 45) is GRANTED. It is FURTHER ORDERED that the parties submit a joint status report by October 1,2013 regarding a schedule for the completion

DATE	NO.	PROCEEDINGS
		of the briefing on Defendants Motions to Dismiss. Signed by Judge Robert L. Wilkins on 9/20/2013. (tcb) (Entered: 09/20/2013)
10/18/2013	59	NOTICE OF APPEAL TO DC CIRCUIT COURT as to 55 Memorandum & Opinion, 56 Order on Motion to Enforce, Order on Motion to Dismiss,,,,,,,,,,,,,,,,,, by PETROLEOS DE VENEZUELA, S.A., PDVSA PETROLEO, S.A.. Filing fee $ 455, receipt number 0090-3505338. Fee Status: Fee Paid. Parties have been notified. (Attachments: # 1 Certificate of Service)(Pizzurro, Joseph) (Entered: 10/18/2013)
10/18/2013	60	NOTICE OF APPEAL TO DC CIRCUIT COURT as to 55 Memorandum & Opinion, 56 Order on Motion to Enforce, Order on Motion to Dismiss,,,,,,,,,,,,,,, by BOLIVARIAN REPUBLIC OF VENEZUELA. Filing fee $ 455, receipt number 0090-3505487. Fee Status:

DATE	NO.	PROCEEDINGS
		Fee Paid. Parties have been notified. (Monts, William) (Entered: 10/18/2013)
10/28/2013	63	MOTION for Entry of Final Judgment *(Partial) Pursuant to Rule 54(b) with Respect to Helmerich & Payne de Venezuela, C.A.'s Expropriation Claim Or, in the Alternative*, MOTION for Certification for interlocatory appeal *Under 28 U.S.C. 1292(b)* by HELMERICH & PAYNE DE VENEZUELA, C.A. (Attachments: # 1 Text of Proposed Order)(Ogden, David) (Entered: 10/28/2013)
11/11/2013	64	Memorandum in opposition to re 63 MOTION for Entry of Final Judgment *(Partial) Pursuant to Rule 54(b) with Respect to Helmerich & Payne de Venezuela, C.A.'s Expropriation Claim Or, in the Alternative*, MOTION for Certification for interlocatory appeal Under 28 U.S.C. 1292(b) filed by BOLIVARIAN REPUBLIC OF VENEZUELA, PDVSA

DATE	NO.	PROCEEDINGS
		PETROLEO, S.A., PETROLEOS DE VENEZUELA, S.A.. (Attachments: # 1 Certificate of Service) (Pizzurro, Joseph) (Entered: 11/11/2013)
11/18/2013	65	REPLY to opposition to motion re 63 MOTION for Entry of Final Judgment *(Partial) Pursuant to Rule 54(b) with Respect to Helmerich & Payne de Venezuela, C.A.'s Expropriation Claim Or, in the Alternative*, MOTION for Certification for interlocatory appeal Under 28 U.S.C. 1292(b) filed by HELMERICH & PAYNE DE VENEZUELA, C.A.. (Ogden, David) (Entered: 11/18/2013)
01/06/2014	66	ORDER granting 63 MOTION for Entry of Final Judgment (Partial) Pursuant to Rule 54(b) with Respect to Helmerich & Payne de Venezuela, C.A.'s Expropriation Claim Or, in the Alternative,, MOTION for Certification for interlocatory appeal Under

DATE	NO.	PROCEEDINGS
		28 U.S.C. 1292(b); It is further ORDERED that final judgment is hereby entered in favor of Defendants with respect to H&P-Vs expropriation claim. This is a final and appealable order. Signed by Judge Robert L. Wilkins on 1/6/2014. (tcb) (Entered: 01/06/2014)
01/14/2014	67	NOTICE OF APPEAL TO DC CIRCUIT COURT as to 66 Order on Motion for Entry of Final Judgment, Order on Motion for Certification for Interlocatory Appeal,, 55 Memorandum & Opinion, 56 Order on Motion to Enforce, Order on Motion to Dismiss,,,,,,,,, by HELMERICH & PAYNE DE VENEZUELA, C.A.. Filing fee $ 505, receipt number 0090-3591473. Fee Status: Fee Paid. Parties have been notified. (Attachments: # 1 Certificate of Service)(Ogden, David) (Entered: 01/14/2014)

DATE	NO.	PROCEEDINGS
01/24/2014		Case reassigned to the Calendar Committee who will oversee it until it is reassigned to another judge. Judge Robert L. Wilkins has been elevated to the U.S. Court of Appeals for DC and is no longer assigned to the case. Any questions should be directed to Terri Barrett, formerly Judge Wilkins deputy clerk, at 202-354-3179 or terri barrett@dcd.uscourts.gov. (ztnr,) (Entered: 01/24/2014)
04/07/2014		Case directly reassigned to Judge Christopher R. Cooper. Calendar Committee no longer assigned to the case. (gt,) (Entered: 04/07/2014)
09/08/2015	72	MANDATE of USCA (certified copy) as to 59 Notice of Appeal to DC Circuit Court, filed by PDVSA PETROLEO, S.A., PETROLEOS DE VENEZUELA, S.A., 60 Notice of Appeal to DC Circuit Court, filed by BOLIVARIAN REPUBLIC OF VENEZUELA, 67 Notice

DATE	NO.	PROCEEDINGS
		of Appeal to DC Circuit Court, filed by HELMERICH & PAYNE DE VENEZUELA, C.A. ORDERED and ADJUDGED that the District Court's denial of Venezuela's motion to dismiss H&P—IDC's expropriation claim be affirmed. In all other respects, the order is hereby reversed and the case remanded for further proceedings, in accordance with the opinion of the court filed herein this date. USCA Case Number 13-7169; Consolidated with 13-7170 and 14-7008. (rd) (Entered: 09/09/2015)
10/01/2015		Minute Entry for proceedings held before Judge Christopher R. Cooper: Status Conference held on 10/1/2015. (Court Reporter LISA MOREIRA.) (mac) (Entered: 10/01/2015)

DATE	NO.	PROCEEDINGS
10/02/2015	73	ORDER: It is hereby ORDERED that the parties shall meet and confer and, no later than October 16, 2015, jointly propose a scheduling order, or separate scheduling orders if agreement cannot be reached, concerning the timing of jurisdictional discovery and the subsequent briefing of motions to dismiss for lack of jurisdiction and/or for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). Signed by Judge Christopher R. Cooper on 10/2/2015. (lccrc3) (Entered: 10/02/2015)
10/19/2015	77	SCHEDULING ORDER: It is hereby ORDERED that Defendants shall, within 21 days of this Order, confirm and, if necessary, supplement the factual basis for their defense that the Court lacks subject matter jurisdiction over the PDVSA defendants under § 1605(a)(3). It is further ORDERED that the parties shall adhere to the following

DATE	NO.	PROCEEDINGS
		schedule for jurisdictional discovery and briefing unless instructed otherwise by subsequent order: Jurisdictional discovery will commence as of the date of this scheduling order; Jurisdictional discovery will close on the 180th day thereafter; Defendants will file their Rule 12(b)(6) motion on the issues discussed in 73 this Court's Order dated October 2, 2015 within 45 days from the close of jurisdictional discovery; Plaintiffs will file their consolidated opposition brief, addressing both Defendants' Rule 12(b)(1) and Rule 12(b)(6) motions, within 60 days of service of Defendants' 12(b)(6) motion; Defendants will conduct responsive discovery, if any, and file a consolidated reply within 60 days of service of Plaintiffs' consolidated opposition. SEE ATTACHED ORDER FOR FULL DETAILS. Signed by Judge Christopher R. Cooper on

DATE	NO.	PROCEEDINGS
		10/19/2015. (lccrc3) (Entered: 10/19/2015)
11/09/2015	78	NOTICE *of Factual Basis of Defendants' Jurisdictional Defense* by BOLIVARIAN REPUBLIC OF VENEZUELA, PDVSA PETROLEO, S.A., PETROLEOS DE VENEZUELA, S.A. (Pizzurro, Joseph) (Entered: 11/09/2015)
01/20/2016	81	MOTION to Compel *(Redacted Version)* by HELMERICH & PAYNE DE VENEZUELA, C.A., HELMERICH & PAYNE INTERNATIONAL DRILLING CO. (Attachments: # 1 Text of Proposed Order Granting Plaintiffs' Motion to Compel, # 2 Declaration of David W. Bowker in Support of Plaintiffs' Motion to Compel, # 3 Exhibit 1, # 4 Exhibit 2, # 5 Exhibit 3, # 6 Exhibit 4, # 7 Exhibit 5, # 8 Exhibit 6, # 9 Exhibit 7, # 10 Exhibit 8, # 11 Exhibit 9, # 12 Exhibit 10, # 13 Exhibit 11, # 14 Exhibit 12, # 15 Exhibit 13,

DATE	NO.	PROCEEDINGS
		# 16 Exhibit 14, # 17 Exhibit 15, # 18 Exhibit 16, # 19 Exhibit 17, # 20 Exhibit 18, # 21 Exhibit 19, # 22 Exhibit 20, # 23 Exhibit 21, # 24 Exhibit 22, # 25 Exhibit 23, # 26 Exhibit 24, # 27 Exhibit 25, # 28 Exhibit 26, # 29 Exhibit 27, # 30 Exhibit 28, # 31 Exhibit 29, # 32 Exhibit 30, # 33 Exhibit 31, # 34 Exhibit 32, # 35 Exhibit 33, # 36 Exhibit 34, # 37 Exhibit 35)(Ogden, David) (Entered: 01/20/2016)
02/05/2016	84	NOTICE *Joint Notice of Discovery Dispute and Request For Extension* by PDVSA PETROLEO, S.A., PETROLEOS DE VENEZUELA, S.A. re 81 MOTION to Compel *(Redacted Version)* (Pizzurro, Joseph) (Entered: 02/05/2016)
02/08/2016		MINUTE ORDER: In light of 84 the parties' Joint Notice of Discovery Dispute and Request for Extension, it is hereby ORDERED that Defendants' opposition to Plaintiffs motion to compel,

DATE	NO.	PROCEEDINGS
		including Defendants' cross-motion for a protective order, be due February 12, 2016. If the Court deems necessary, after briefing, it shall set a hearing on the motions in a subsequent order. Signed by Judge Christopher R. Cooper on 2/8/16. (lccrc3) (Entered: 02/08/2016)
02/12/2016	85	Joint MOTION for Protective Order by BOLIVARIAN REPUBLIC OF VENEZUELA, PDVSA PETROLEO, S.A., PETROLEOS DE VENEZUELA, S.A. (Attachments: # 1 Declaration —Joseph D. Pizzurro, # 2 Exhibit —1, # 3 Exhibit —2, # 4 Exhibit —3, # 5 Exhibit —4, # 6 Exhibit —5, # 7 Memorandum in Support, # 8 Text of Proposed Order, # 9 Certificate of Service) (Pizzurro, Joseph) (Entered: 02/12/2016)

DATE	NO.	PROCEEDINGS
02/12/2016	87	MEMORANDUM by BOLIVARIAN REPUBLIC OF VENEZUELA. (Oakley, Bruce) (Entered: 02/12/2016)
02/19/2016	94	SEALED OPPOSITION filed by HELMERICH & PAYNE DE VENEZUELA, C.A., HELMERICH & PAYNE INTERNATIONAL DRILLING CO. re 85 Joint MOTION for Protective Order :(See Docket Entry No. 90 to view documents)(ztd) (Entered: 03/02/2016)
02/29/2016	91	REPLY to opposition to motion re 85 Joint MOTION for Protective Order, 81 MOTION to Compel *(Redacted Version)* *(Redacted & Corrected Version)* filed by HELMERICH & PAYNE DE VENEZUELA, C.A., HELMERICH & PAYNE INTERNATIONAL DRILLING CO.. (Attachments: # 1 Declaration of David W. Bowker, # 2 Exhibit 36, # 3 Exhibit 37, # 4 Exhibit 38,

DATE	NO.	PROCEEDINGS
		# 5 Exhibit 39, # 6 Exhibit 40, # 7 Exhibit 41, # 8 Exhibit 42)(Ogden, David) (Entered: 02/29/2016)
02/29/2016	92	ORDER entering 86 Stipulated Discovery and Confidentiality Order. Signed by Judge Christopher R. Cooper on 2/29/16. (lccrc3) (Entered: 02/29/2016)
03/11/2016	95	Joint MOTION to Stay by BOLIVARIAN REPUBLIC OF VENEZUELA, PDVSA PETROLEO, S.A., PETROLEOS DE VENEZUELA, S.A. (Attachments: # 1 Memorandum in Support, # 2 Text of Proposed Order, # 3 Certificate of Service) (Pizzurro, Joseph) (Entered: 03/11/2016)
03/28/2016	96	Memorandum in opposition to re 95 Joint MOTION to Stay filed by HELMERICH & PAYNE DE VENEZUELA, C.A., HELMERICH & PAYNE INTERNATIONAL DRILLING CO.. (Attachments: # 1

DATE	NO.	PROCEEDINGS
		Declaration of David W Bowker, # 2 Exhibit 1, # 3 Exhibit 2, # 4 Exhibit 3, # 5 Exhibit 4, # 6 Exhibit 5)(Ogden, David) (Entered: 03/28/2016)
04/07/2016	99	REPLY to opposition to motion re 95 Joint MOTION to Stay filed by BOLIVARIAN REPUBLIC OF VENEZUELA, PDVSA PETROLEO, S.A., PETROLEOS DE VENEZUELA, S.A.. (Attachments: # 1 Certificate of Service)(Pizzurro, Joseph) (Entered: 04/07/2016)
04/12/2016		Minute Entry for proceedings held before Judge Christopher R. Cooper: Motion Hearing held on 4/12/2016 re Defendants' 85 Joint MOTION for Protective Order, Defendants' 95 Joint MOTION to Stay, Plaintiffs' 81 MOTION to Compel(Redacted Version); Argument heard and these matters are taken under advisement. (Court Reporter

DATE	NO.	PROCEEDINGS
		Lisa Moreira) (tcr) (Entered: 04/13/2016)
04/19/2016		SEALED MINUTE ORDER: It is hereby ORDERED that, no later than Friday, April 22, 2016, Defendants respond, by surreply not to exceed 5 pages, to Plaintiffs' argument, made on page 17 of their consolidated reply memorandum, that evidence of a "meeting on 05-24-2010 between PDVSA Servicios and the H&P Vice-presidency in Houston," Pls.' Ex. 40 at 5, and the reference in a presentation by PDVSA-SP to four pieces of equipment "that are being purchased in Houston," Pls.' Ex. 41 at 4, 20, "rebut the PDVSA Defendants' answer to PDVSA Interrogatory 17 that neither [PDVSA-S] nor [PDVSA-SP] engages in commercial activity in the United States," PDVSA Opp'n 32.(This document is SEALED and only available to authorized persons.)Signed by Judge Christopher R. Cooper on 4/19/2016.(ztcr) (Entered:

DATE	NO.	PROCEEDINGS
		04/19/2016)
04/22/2016	101	SURREPLY to re 85 Joint MOTION for Protective Order, 81 MOTION to Compel (Redacted Version) filed by PDVSA PETROLEO, S.A., PETROLEOS DE VENEZUELA, S.A.. (Attachments: # 1 Declaration -Juan O. Perla, # 2 Exhibit -1, # 3 Exhibit -2, # 4 Exhibit -3, # 5 Exhibit -4, # 6 Exhibit -5, # 7 Exhibit -6, # 8 Exhibit -7, # 9 Exhibit -8, # 10 Certificate of Service) (Pizzurro, Joseph) (Entered: 04/22/2016)
04/26/2016	102	NOTICE *of PDVSA Defendants' Statement Regarding Discovery Dispute* by PDVSA PETROLEO, S.A., PETROLEOS DE VENEZUELA, S.A. (Pizzurro, Joseph) (Entered: 04/26/2016)
04/26/2016	104	NOTICE *of Plaintiffs' Statement Regarding Discovery Dispute* by HELMERICH & PAYNE

DATE	NO.	PROCEEDINGS
		DE VENEZUELA, C.A., HELMERICH & PAYNE INTERNATIONAL DRILLING CO. (Attachments: # 1 Declaration of David W. Bowker, # 2 Exhibit 1, # 3 Exhibit 2, # 4 Exhibit 3, # 5 Exhibit 4, # 6 Exhibit 5, # 7 Exhibit 6, # 8 Exhibit 7, # 9 Exhibit 8, # 10 Exhibit 9, # 11 Exhibit 10, # 12 Exhibit 11, # 13 Exhibit 12, # 14 Exhibit 13, # 15 Exhibit 14)(Ogden, David) (Entered: 04/26/2016)
04/29/2016	105	MOTION for Leave to File *Supplemental Memorandum in Support of Plaintiffs' Motion to Compel and in Opposition to Defendants' Cross—Motion for Entry of Protective Order by* HELMERICH & PAYNE DE VENEZUELA, C.A., HELMERICH & PAYNE INTERNATIONAL DRILLING CO. (Ogden, David) (Entered: 04/29/2016)

DATE	NO.	PROCEEDINGS
05/02/2016		MINUTE ORDER granting 105 Plaintiffs' Motion for Leave to File: It is hereby ORDERED that Plaintiffs may, no later than May 4, 2016, file a three-page supplemental memorandum of law responding to Petrleos de Venezuela, S.A.'s and PDVSA Petrleo, S.A.'s April 22, 2016 filing, submitted in response to this Courts April 19, 2016 Order. Signed by Judge Christopher R. Cooper on 5/2/2016. (lccrc3) (Entered: 05/02/2016)
05/02/2016		MINUTE ORDER: Having considered the parties' 102, 104 statements regarding discovery dispute, it is hereby ORDERED that the PDVSA Defendants produce to Plaintiffs, no later than May 9, 2016, complete copies of the five sample pages requested. Signed by Judge Christopher R. Cooper on 5/2/2016. (lccrc3) (Entered: 05/02/2016)

DATE	NO.	PROCEEDINGS
05/04/2016	109	SUPPLEMENTAL MEMORANDUM to filed by HELMERICH & PAYNE DE VENEZUELA, C.A., HELMERICH & PAYNE INTERNATIONAL DRILLING CO.. (Attachments: # 1 Declaration of David W. Bowker, # 2 Exhibit 43, # 3 Exhibit 44)(Ogden, David) (Entered: 05/04/2016)
05/06/2016	111	MOTION for Leave to File *Memorandum In Response To Plaintiffs' Supplemental Memorandum of Law In Support of Plaintiffs' Motion To Compel* by PDVSA PETROLEO, S.A., PETROLEOS DE VENEZUELA, S.A. (Attachments: # 1 Certificate of Service)(Pizzurro, Joseph) (Entered: 05/06/2016)
05/06/2016		MINUTE ORDER: A telephonic conference re 111 PDVSA Defendants' Motion for Leave to File has been set for Monday, May 9, 2016 at 2:30 PM before Judge Christopher R. Cooper.

DATE	NO.	PROCEEDINGS
		Signed by Judge Christopher R. Cooper on 5/6/2016. (lccrc3) (Entered: 05/06/2016)
05/09/2016		Minute Entry for proceedings held before Judge Christopher R. Cooper: Telephone Conference held on 5/9/2016. Matter taken under advisement. (Court Reporter: Crystal Pilgrim). (kt) (Entered: 05/09/2016)
05/10/2016		MINUTE ORDER: It is hereby ORDERED that 111 PDVSA Defendants' Motion for Leave to File be DENIED as moot in light of the telephonic conference held on May 9, 2016. Signed by Judge Christopher R. Cooper on 5/10/2016. (lccrc3) (Entered: 05/10/2016)
05/13/2016	112	MEMORANDUM OPINION re: Plaintiffs' 81 Motion to Compel and 83 Sealed Motion and Defendants' 85 Joint Motion for a Protective Order; Defendants' 95 Joint Motion to Stay.(This document is SEALED and only available to authorized

DATE	NO.	PROCEEDINGS
		persons.)Signed by Judge Christopher R. Cooper on 5/13/2016.(ztcr) (Entered: 05/13/2016)
05/13/2016	113	ORDER granting in part and denying in part Plaintiffs' 81 Motion to Compel and 83 Sealed Motion and Defendants' 85 Joint Motion for a Protective Order; denying Defendants' 95 Joint Motion to Stay. Signed by Judge Christopher R. Cooper on 5/13/2016. (tcr) (Entered: 05/13/2016)
05/13/2016	114	REDACTED MEMORANDUM OPINION re: Plaintiffs' 81 Motion to Compel and 83 Sealed Motion and Defendants' 85 Joint Motion for a Protective Order; Defendants' 95 Joint Motion to Stay. Signed by Judge Christopher R. Cooper on 5/13/2016. (lccrc3) (Entered: 05/13/2016)
05/23/2016	116	SCHEDULING ORDER approving 115 the parties' proposed schedule for the completion of jurisdictional discovery. It is further

DATE	NO.	PROCEEDINGS
		ORDERED that, while the parties may stipulate to alterations to interim deadlines, any extension of the close of jurisdictional discovery shall be by Court order only on a showing of good cause. Signed by Judge Christopher R. Cooper on 5/23/16. (lccrcl) (Entered: 05/23/2016)
05/25/2016	117	**MOTION for Reconsideration re 113 Order on Motion to Compel, Order on Motion for Protective Order, Order on Motion to Stay,,, 114 Memorandum & Opinion, by BOLIVARIAN REPUBLIC OF VENEZUELA, PDVSA PETROLEO, S.A., PETROLEOS DE VENEZUELA, S.A. (Attachments: # 1 Exhibit 15-423 Brief for the United States as Amicus Curiae)(Monts, William) (Entered: 05/25/2016)**
05/31/2016	118	**NOTICE *of Opposition to Defendants' Motion for Reconsideration* by HELMERICH & PAYNE**

DATE	NO.	PROCEEDINGS
		DE VENEZUELA, C.A., HELMERICH & PAYNE INTERNATIONAL DRILLING CO. re 117 MOTION for Reconsideration re 113 Order on Motion to Compel, Order on Motion for Protective Order, Order on Motion to Stay,,, 114 Memorandum & Opinion, (Ogden, David) (Entered: 05/31/2016)
06/08/2016	122	Memorandum in opposition to re 117 MOTION for Reconsideration re 113 Order on Motion to Compel, Order on Motion for Protective Order, Order on Motion to Stay,,, 114 Memorandum & Opinion, filed by HELMERICH & PAYNE DE VENEZUELA, C.A., HELMERICH & PAYNE INTERNATIONAL DRILLING CO.. (Attachments: # 1 Exhibit A)(Ogden, David) (Entered: 06/08/2016)
06/15/2016	123	REPLY to opposition to motion re 117 MOTION for Reconsideration re 113

DATE	NO.	PROCEEDINGS
		Order on Motion to Compel, Order on Motion for Protective Order, Order on Motion to Stay,,, 114 Memorandum & Opinion, filed by BOLIVARIAN REPUBLIC OF VENEZUELA, PDVSA PETROLEO, S.A., PETROLEOS DE VENEZUELA, S.A.. (Pizzurro, Joseph) (Entered: 06/15/2016)
06/28/2016	124	ORDER denying as moot 117 Defendants' Motion for Reconsideration; staying all proceedings in this action, including jurisdictional discovery, pending the Supreme Court's resolution of the question presented in Bolivarian Republic of Venezuela v. Helmerich and Payne International Drilling Co., No. 15-423. Signed by Judge Christopher R. Cooper on 6/28/2016. (lccrc3) (Entered: 06/28/2016)

Relevant Docket Entries from the United States Court of Appeals for the District of Columbia Circuit, No. 13-7169 (lead)

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13-7169

HELMERICH & PAYNE INTERNATIONAL DRILLING CO., and HELMERICH & PAYNE DE VENEZUELA, C.A.,

Plaintiffs,

v.

BOLIVARIAN REPUBLIC OF VENEZUELA, PETRÓLEOS DE VENEZUELA, S.A., and PDVSA PETRÓLEO, S.A.,

Defendants.

DOCKET ENTRIES

DATE	PROCEEDINGS
10/25/2013	NOTICE OF APPEAL filed [1463030] by PDVSA Petroleo, S.A. and Petroleos De Venezuela, S.A. seeking review of a decision by the U.S. District Court in 1:11-cv-01735-RLW. Assigned USCA Case Number [13-7169].

DATE	PROCEEDINGS
10/25/2013	CLERK'S ORDER filed [1463127] consolidating cases 13-7170 (Consolidation started 10/25/2013) with 13-7169; directing party to file initial submissions: APPELLANT docketing statement due 11/25/2013. APPELLANT certificate as to parties, etc. due 11/25/2013. APPELLANT statement of issues due 11/25/2013. APPELLANT underlying decision due 11/25/2013. APPELLANT deferred appendix statement due 11/25/2013. APPELLANT notice of appearance due 11/25/2013. APPELLANT transcript status report due 11/25/2013. APPELLANT procedural motions due 11/25/2013. APPELLANT dispositive motions due 12/09/2013; directing party to file initial submissions: APPELLEE certificate as to parties, etc. due 11/25/2013. APPELLEE entry of appearance due 11/25/2013. APPELLEE procedural motions due 11/25/2013. APPELLEE dispositive motions due 12/09/2013 [13-7169, 13-7170]

DATE	PROCEEDINGS
03/10/2014	CLERK'S ORDER filed [1483094] setting briefing schedule and format: DEFENDANT-APPELLANTS Joint Principal Brief due 05/12/2014. APPENDIX due 05/12/2014. DEFENDANT-APPELLEES/CROSS-APPELLANTS Joint Principal and Response Brief due 07/11/2014. DEFENDANT-APPELLANTS/ CROSS-APPELLEES Joint Response and Reply Brief due 08/25/2014. DEFENDANT-CROSS APPELLANTS Joint Reply Brief due 09/24/2014. The parties will be notified by separate order of the oral argument date and composition of the merits panel. [13-7169, 13-7170, 14-7008]
05/12/2014	APPELLANT BRIEF [1492572] filed by PDVSA Petroleo, S.A. and Petroleos De Venezuela, S.A. in 13-7169, Bolivarian Republic of Venezuela in 13-7170 [Service Date: 05/12/2014] Length of Brief: 13,781. [13-7169, 13-7170, 14-7008] (Pizzurro, Joseph)

DATE	PROCEEDINGS
05/12/2014	*JOINT* APPENDIX [1492577] filed by PDVSA Petroleo, S.A., Petroleos De Venezuela, S.A. and Bolivarian Republic of Venezuela in 13-7169. [Volumes: 2] [Service Date: 05/12/2014] [13-7169, 13-7170, 14-7008] (Pizzurro, Joseph)
05/12/2014	SEALED APPENDIX (Volume III of III) [1492964] filed by PDVSA Petroleo, S.A., Petroleos De Venezuela, S.A. and Bolivarian Republic of Venezuela, Helmerich & Payne De Venezuela, C.A. and Helmerich & Payne International Drilling Co. in 13-7169, Bolivarian Republic of Venezuela and Helmerich & Payne De Venezuela, C.A., Helmerich & Payne International Drilling Co., PDVSA Petroleo, S.A. and Petroleos De Venezuela, S.A. in 13-7170, Helmerich & Payne De Venezuela, C.A. and Bolivarian Republic of Venezuela, Helmerich & Payne International Drilling Co., PDVSA Petroleo, S.A. and Petroleos De Venezuela, S.A. in 14-7008. [Volumes: 1] [Service Date: 05/12/2014] [13-7169, 13-7170, 14-7008]

DATE	PROCEEDINGS
07/11/2014	**APPELLEE & CROSS-APPELLANT BRIEF** [1502235] filed by Helmerich & Payne De Venezuela, C.A. and Helmerich & Payne International Drilling Co. in 13-7169, 13-7170, Helmerich & Payne De Venezuela, C.A. in 14-7008 [Service Date: 07/11/2014] Length of Brief: 16,470. [13-7169, 13-7170, 14-7008] (Ogden, David)
08/25/2014	**APPELLANT REPLY & CROSS APPELLEE BRIEF** [1509209] filed by PDVSA Petroleo, S.A., Petroleos De Venezuela, S.A. and Bolivarian Republic of Venezuela in 13-7169, Bolivarian Republic of Venezuela and PDVSA Petroleo, S.A. and Petroleos De Venezuela, S.A. in 13-7170, Bolivarian Republic of Venezuela, PDVSA Petroleo, S.A. and Petroleos De Venezuela, S.A. in 14-7008 [Service Date: 08/25/2014] Length of Brief: 13,895. [13-7169, 13-7170, 14-7008] (Pizzurro, Joseph)
09/24/2014	**CROSS-APPELLANT REPLY BRIEF** [1513917] filed by Helmerich & Payne De Venezuela, C.A. in 14-7008 [Service Date: 09/24/2014] Length of Brief: 5,165 Words. [14-7008, 13-7169, 13-7170] (Ogden, David)

DATE	PROCEEDINGS
01/16/2015	ORAL ARGUMENT HELD before Judges Garland, Tatel and Sentelle. [13-7169, 13-7170, 147008]
05/01/2015	PER CURIAM JUDGMENT filed [1550132] that the District Court's denial of Venezuela's motion to dismiss H&P-IDC's expropriation claim be affirmed. In all other respects, the order is hereby reversed and the case remanded for further proceedings, for the reasons in the accompanying opinion. Before Judges: Garland, Tatel and Sentelle. [13-7169, 13-7170, 14-7008]
05/01/2015	OPINION filed [1550133] (Pages: 22) for the Court by Judge Tatel, CONCURRING/DISSENTING OPINION (Pages: 5) by Judge Sentelle [13-7169, 13-7170, 14-7008]

DATE	PROCEEDINGS
05/29/2015	PETITION filed [1554872] by Appellants PDVSA Petroleo, S.A., Petroleos De Venezuela, S.A. and Appellee Bolivarian Republic of Venezuela in 13-7169, Appellant Bolivarian Republic of Venezuela and Appellees PDVSA Petroleo, S.A. and Petroleos De Venezuela, S.A. in 13-7170, Appellees Bolivarian Republic of Venezuela, PDVSA Petroleo, S.A. and Petroleos De Venezuela, S.A. in 14-7008 for rehearing, for rehearing en banc. [Service Date: 05/29/2015 by CM/ECF NDA] Pages: 21-30. [13-7169, 13-7170, 14-7008] (Monts, William)
06/03/2015	CLERK'S ORDER filed [1555418] directing response to petition for rehearing en banc [1554872-3] The response may not exceed 15 pages. Response to Petition due 06/18/2015 [13-7169, 13-7170, 14-7008]

DATE	PROCEEDINGS
06/18/2015	RESPONSE FILED [1558223] by Helmerich & Payne De Venezuela, C.A. and Helmerich & Payne International Drilling Co. in 13-7169, 13-7170, 14-7008 to petition for rehearing [1554872-2], petition for rehearing en banc [1554872-3] [Service Date: 06/18/2015 by CM/ECF NDA] Pages: 11-15. [13-7169, 13-7170, 14-7008] (Ogden, David)
06/23/2015	MOTION filed [1559218] by PDVSA Petroleo, S.A., Petroleos De Venezuela, S.A. and Bolivarian Republic of Venezuela in 13-7169, Bolivarian Republic of Venezuela and PDVSA Petroleo, S.A. and Petroleos De Venezuela, S.A. in 13-7170, Bolivarian Republic of Venezuela, PDVSA Petroleo, S.A. and Petroleos De Venezuela, S.A. in 14-7008 for leave to file reply (Response to Motion served by mail due on 07/09/2015) [Service Date: 06/23/2015 by CM/ECF NDA] Pages: 1-10. [13-7169, 13-7170, 14-7008] (Monts, William)

DATE	PROCEEDINGS
06/24/2015	REPLY LODGED [1559325] by PDVSA Petroleo, S.A., Petroleos Do Venezuela, S.A. and Bolivarian Republic of Venezuela in 13-7169, Bolivarian Republic of Venezuela and PDVSA Petroleo, S.A. and Petroleos Do Venezuela, S.A. in 13-7170, Bolivarian Republic of Venezuela, PDVSA Petroleo, S.A. and Petroleos De Venezuela, S.A. in 14-7008 (letter reply brief separately lodged pursuant to request from Clerk's Office). [Service Date: 06/24/2015] [13-7169, 13-7170, 14-7008]-[Edited 08/12/2015 by SHA-Document Lodged by Cleric's Office] (Monts, Wiliam)
07/30/2015	PER CURIAM ORDER filed [1565462] denying petition for rehearing [1554872-2]. Before Judges: Garland, Tatel and Sentelle*. [13-7169, 13-7170, 14-7008]

DATE	PROCEEDINGS
07/30/2015	PER CURIAM ORDER, En Banc, filed [1565463] denying appellees/cross-appellants' motion for leave to file reply in support of their petition for panel rehearing and rehearing en banc, and the lodged reply [1559218-2]. The Clerk is directed to note the docket accordingly. Before Judges: Garland, Henderson, Rogers, Tatel, Brown, Griffith, Kavanaugh, Srinivasan, Millett, Pillard, Wilkins*, and Sentelle. [13-7169, 13-7170, 14-7008]
07/30/2015	PER CURIAM ORDER, En Banc, filed [SEE ORDER FOR DETAILS] [1565465] denying petition for rehearing en banc [1554872-3] Before Judges: Garland, Henderson, Rogers, Tatel, Brown, Griffith, Kavanaugh, Srinivasan, Millett, Pillard, and Wilkins*. [13-7169, 13-7170, 14-7008]
08/05/2015	MOTION filed [1566326] by PDVSA Petroleo, S.A., Petroleos De Venezuela, S.A. and Bolivarian Republic of Venezuela in 13-7169, Bolivarian Republic of Venezuela and PDVSA Petroleo, S.A. and Petroleos De Venezuela, S.A. in 13-7170, Bolivarian Republic of Venezuela, PDVSA Petroleo, S.A.

DATE	PROCEEDINGS
	and Petroleos De Venezuela, S.A. in 14-7008 to stay mandate (Response to Motion served by mail due on 08/20/2015) [Service Date: 08/05/2015 by CM/ECF NDA] Pages: 11-15. [13-7169, 13-7170, 147008] (Monts, William)
08/20/2015	RESPONSE IN OPPOSITION FILED [1568871] by Helmerich & Payne De Venezuela, C.A. and Helmerich & Payne International Drilling Co. in 13-7169, 13-7170, 14-7008 to motion to stay mandate [1566326-2] [Service Date: 08/20/2015 by CM/ECF NDA] Pages: 11-15. [13-7169, 13-7170, 14-7008] (Ogden, David)
08/25/2015	PER CURIAM ORDER filed [1569630] denying appellants/cross-appellees' motion to stay mandate [1566326-2] Before Judges: Garland, Tatel and Sentelle. [13-7169, 13-7170, 14-7008]
09/03/2015	MANDATE ISSUED to Clerk, District Court [13-7169, 13-7170, 14-7008]

Relevant Docket Entries from the United States Court of Appeals for the District of Columbia Circuit, No. 13-7170 (consol.)

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13-7170

HELMERICH & PAYNE INTERNATIONAL DRILLING CO., and HELMERICH & PAYNE DE VENEZUELA, C.A.,

Plaintiffs,

v.

BOLIVARIAN REPUBLIC OF VENEZUELA, PETRÓLEOS DE VENEZUELA, S.A., and PDVSA PETRÓLEO, S.A.,

Defendants.

DOCKET ENTRIES

DATE	PROCEEDINGS
10/25/2013	NOTICE OF APPEAL filed [1463034] by Bolivarian Republic of Venezuela seeking review of a decision by the U.S. District Court in 1:11-cv-01735-RLW. Assigned USCA Case Number [13-7170]

DATE	PROCEEDINGS
10/25/2013	CLERK'S ORDER filed [1463127] consolidating cases 13-7170 (Consolidation started 10/25/2013) with 13-7169; directing party to file initial submissions: APPELLANT docketing statement due 11/25/2013. APPELLANT certificate as to parties, etc. due 11/25/2013. APPELLANT statement of issues due. 11/25/2013. APPELLANT underlying decision due 11/25/2013. APPELLANT deferred appendix statement due 11/25/2013. APPELLANT notice of appearance due 11/25/2013. APPELLANT transcript status report due 11/25/2013. APPELLANT procedural motions due 11/25/2013. APPELLANT dispositive motions due 12/09/2013; directing party to file initial submissions: APPELLEE certificate as to parties, etc. due 11/25/2013. APPELLEE entry of appearance due 11/25/2013. APPELLEE procedural motions due 11/25/2013. APPELLEE dispositive motions due 12/09/2013 [13-7169, 13-7170]

Relevant Docket Entries from the United States Court of Appeals for the District of Columbia Circuit, No. 14-7008 (consol.)

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14-7008

HELMERICH & PAYNE INTERNATIONAL DRILLING CO., and HELMERICH & PAYNE DE VENEZUELA, C.A.,

Plaintiffs,

v.

BOLIVARIAN REPUBLIC OF VENEZUELA, PETRÓLEOS DE VENEZUELA, S.A., and PDVSA PETRÓLEO, S.A.,

Defendants.

DOCKET ENTRIES

DATE	PROCEEDINGS
01/17/2014	NOTICE OF APPEAL filed [1477152] by Helmerich & Payne De Venezuela, C.A. seeking review of a decision by the US. District Court in 1:11-cv-01735-RLW. Assigned USCA Case Number [14-7008]
01/29/2014	CLERK'S ORDER filed [1477312] consolidating cases 14-7008 (Consolidation started 01/29/2014) with 13/7169 [13-7169, 13-7170, 14-7008]

Plaintiffs' Complaint (Sept. 23, 2011)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Case No. 1:11-cv-01735

HELMERICH & PAYNE INTERNATIONAL DRILLING CO.,
and
HELMERICH & PAYNE DE VENEZUELA, C.A.
1437 South Boulder Avenue
Tulsa, Oklahoma 74119

Plaintiffs,

v.

BOLIVARIAN REPUBLIC OF VENEZUELA,
Dr. Carlos Escarra Malave
Procurador General de la República
Av. Los Illustres, cruce con calle
Francisco Iazo Martí
Edificio Procuraduría General de la República
Piso 8., Urb. Santa Mónica
Caracas 1040
VENEZUELA

PETRÓLEOS DE VENEZUELA, S.A.,
Avenida Libertador La Campiña, Apartado 169
Caracas 1010-A
VENEZUELA

and PDVSA PETRÓLEO, S.A.,
Avenida Libertador La Campiña, Apartado 169
Caracas 1060
VENEZUELA

Defendants.

Filed: September 23, 2011

COMPLAINT

INTRODUCTION

1. This is an action brought by an American oil-drilling company and its wholly-owned subsidiary against the Venezuelan government and its agencies and instrumentalities that operate Venezuela's state-owned oil company:

(a) under the expropriation exception to immunity under the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. § 1605(a)(3), to redress defendants' 2010 seizure of Plaintiffs' long-established Venezuelan oil drilling business, including eleven fully operational oil drilling rigs and all associated equipment, infrastructure, and personal and real property, without just compensation, in violation of international law; and

(b) under the commercial activities exception to immunity under the FSIA, 28 U.S.C. § 1605(a)(2), to redress flagrant, ongoing breaches of contract by defendants, who are engaged in commercial activity in Venezuela and the United States and whose breaches of contracts with

plaintiffs have caused and continue to cause direct effects in the United States.

2. For more than 55 years and continuing until 2010, plaintiff Helmerich & Payne de Venezuela, C.A. ("H&P-V") and its predecessors have provided contract oil and gas drilling services in Venezuela. H&P-V is a wholly owned subsidiary of Tulsa, Oklahoma-based plaintiff Helmerich & Payne International Drilling Co. ("H&P-IDC"). For the last 14 years, H&P-V has provided contract drilling services exclusively to Venezuelan state-owned entities, including defendants Petróleos de Venezuela, S.A. ("PDVSA") and PDVSA Petróleo, S.A. ("PDVSA-P") that by law enjoy a monopoly on Venezuela's oil reserves. Defendants the Bolivarian Republic of Venezuela ("Venezuela"), PDVSA, and PDVSA-P hereafter are referred to collectively as "Defendants." PDVSA and PDVSA-P are hereafter referred to collectively as "the PDVSA Defendants." Plaintiffs H&P-IDC and H&P-V are hereafter referred to collectively as "H&P" or "Plaintiffs."

3. On or about June 12, 2010, without prior warning, employees of the PDVSA Defendants and, upon information and belief, armed and uniformed soldiers of the Venezuelan National Guard, surrounded and unlawfully blockaded the business premises of H&P-V's drilling operations in Ciudad Ojeda, in the western region of Venezuela. On or about June 13 and 14, 2010, employees of the PDVSA Defendants and armed and uniformed soldiers of the Venezuelan National Guard surrounded and unlawfully blockaded the business premises of H&P-V's drilling operations in Anaco, in the eastern region of Venezuela, at that time H&P-V's headquarters in Venezuela. On information and

belief, in effectuating both blockades, the employees of the PDVSA Defendants and the Venezuelan National Guard soldiers acted at the direction of Defendant Venezuela and its anti-American and authoritarian President Hugo Chávez and/or his Minister of Energy and Petroleum Rafael Ramírez. The blockade was for the purposes of seizing H&P-V's assets, preventing H&P-V from relocating any assets from its yards, and intimidating H&P into forgiving long-outstanding debts of the PDVSA Defendants and into continuing to provide drilling services to the PDVSA Defendants without having been paid for work that H&P-V had already completed on prior contracts. On information and belief, although ordered and directed by senior officials of the Venezuelan government, this seizure of H&P's assets was outside the scope of any colorable Venezuelan legal authority.

4. More than two weeks later, on June 29, 2010, with the unlawful blockades of H&P-V's business premises still in effect, Defendant Venezuela, acting through the Venezuelan National Assembly, issued a "Bill of Agreement" declaring H&P-V's property to be of "public benefit and good" and recommending that President Chávez issue a "Decree of Expropriation." That same day, President Chávez issued "Presidential Decree No. 7532," directing Defendant PDVSA "or its designee affiliate" to complete what President Chávez called the "forcible taking" of H&P-V's oil drilling rigs and "all the personal and real property and other improvements made by [the] company" (hereinafter, "Expropriation Decree"). At Defendant Venezuela's and President Chávez's direction, the PDVSA

Defendants took possession of H&P-V's assets, and assumed all of H&P-V's oil-drilling operations.

5. With the expropriation complete, Minister Ramírez — who serves simultaneously as Minister of Energy and Petroleum and as President of Defendant PDVSA — appeared at the entrance to H&P-V's yard in Anaco to address a large, pre-planned political rally of employees of the PDVSA Defendants, armed and uniformed Venezuelan National Guard soldiers, and others. Minister/President Ramírez declared:

> [W]e send our kind regards of solidarity to Commander Hugo Chávez. Long live Commander Chávez! Long live the Bolivarian Revolution! Long live the oil workers! At this moment . . . the Venezuelan Government . . . is taking control over this drill company which has been nationalized by the revolution.
>
> The company Helmerich & Payne . . . has operated in our country for many years . . . Today, the Revolutionary Government took control over that company . . .
>
> You have been here guarding assets that now belong to the Venezuelan State. I acknowledge and appreciate your constant watch in order to protect the people's interests . . . . Revolutionary salutation: Socialist Nation or Death. We shall be victorious!

Minister/President Ramírez also condemned what he called H&P's "foreign gentlemen investors" and announced that employees of "this American company" would now "become part of the payroll" of PDVSA.

6. These events culminated Defendants' unlawful treatment of "this American company" that had begun long before Minister/President Ramírez's inflammatory rhetoric on July 2, 2010. Beginning in late 2008 and 2009, despite the fact that H&P-V had fully performed all of its obligations under the relevant contracts, the PDVSA Defendants began systematically to breach those contracts. Although contractually obligated to pay at clearly established rates, the PDVSA Defendants - knowing that Venezuelan courts would not protect H&P's commercial rights - simply refused to pay as required under the contracts. The PDVSA Defendants' unexcused failure to pay for H&P's oil drilling services has resulted in over $32 million in unpaid invoices, and Defendants have expressed no intention of fulfilling their contractual obligations.

7. H&P cannot and will not receive just compensation for their seized business and property under Venezuelan law through the Venezuelan courts. Nor can they or will they receive justice in Venezuelan courts for Defendants' blatant breaches of contract. The Venezuelan courts are politically controlled by President Chávez and the executive branch of Defendant Venezuela, and for all practical purposes never rule against the Venezuelan government. According to the United States Department of State, the appellate court that would have jurisdiction over this case if it were tried and appealed in Venezuela has "ruled in favor of the government in 324 of the 325 cases brought by private citizens against the government." *See* U.S. Department of State, *2009 Human Rights Report: Venezuela* (Mar. 11, 2010). On information and belief, the sole case decided by that court in favor of a

private party against the government was later annulled by the Constitutional Chamber of the Supreme Tribunal of Justice, which invoked a special power that had never before been used in Venezuelan judicial history. President Chávez exercises complete control over judges and the judicial system. At President Chávez's direction, a simple majority of the National Assembly appoints and removes the highest court's judges, who, in turn, have the power to remove lower court judges without cause, and regularly do so for political reasons and to maintain control over judicial rulings. As a result, President Chávez demands and receives judges' loyalty. Upon information and belief, no U.S. company has ever prevailed in Venezuelan courts in a civil action for damages against the Chávez regime.

8. Where, as here, a foreign state engaged in the unlawful taking of a U.S.-owned business (along with related property) and in commercial activity in the United States would otherwise be able to rely on corrupt political control of its own judicial system to violate international and commercial rights with impunity, the FSIA establishes jurisdiction in the federal courts.

THE PARTIES

Plaintiffs

9. Plaintiff Helmerich & Payne International Drilling Co. ("H&P-IDC") is a domestic and international oil and gas drilling company. It is incorporated in Delaware and has its principal executive office at 1437 South Boulder Avenue, Tulsa, Oklahoma 74119. It is engaged in drilling of oil and gas wells for exploration and production companies all over the world. It has substantial

onshore and offshore drilling operations in the United States, as well as abroad, where it does business through branches or wholly owned subsidiaries in South America, Africa, and the Middle East. H&P-IDC is the wholly-owned subsidiary of Helmerich & Payne, Inc. ("H&P, Inc."), a public company whose shares are traded on the New York Stock Exchange. H&P, Inc. was incorporated in 1940 and is the successor to a business originally organized in 1920. It is one of the oldest and most experienced land oil and gas drilling companies in the world.

10. Plaintiff Helmerich & Payne de Venezuela, C.A. ("H&P-V"), a wholly owned subsidiary of H&P-IDC, is an oil and gas drilling company. It is incorporated in Venezuela, had its principal Venezuelan office in Anaco, Venezuela, and also used the offices of H&P-IDC at 1437 South Boulder Avenue, Tulsa, Oklahoma 74119. Due to its ownership by a U.S. company, H&P-V is expressly regarded and treated as a "foreign company" under Venezuelan law. H&P-V is a U.S. company for purposes of international law.

Defendants

11. Defendant Bolivarian Republic of Venezuela ("Venezuela") is a foreign state. It has been controlled by the regime of Venezuelan President Hugo Chávez since 1999.

12. Defendant Petróleos de Venezuela, S.A. ("PDVSA") is an agency or instrumentality of Venezuela. PDVSA is incorporated in Venezuela, with its principal executive office at Avenida Libertador, La Campiria Apartado 169, Caracas 1010-A, Bolivarian Republic of Venezuela. PDVSA is

a separate corporate entity from the Venezuelan government, but it is wholly owned and controlled by Defendant Venezuela and was legislatively created in 1975 as an instrument of Venezuela's national oil policy. The Venezuelan legislature created PDVSA by means of a statute entitled "Organic Law that Reserves the Industry and Commerce in Hydrocarbons to the State." PDVSA is governed by public law in Venezuela, and Venezuelan law requires that oil and gas activities be undertaken for the public welfare and in the social interest. PDVSA is required by law to follow the Ministry of Energy and Petroleum's guidelines, plans, and strategies, as well as the norms issued by the National Development Plans for the hydrocarbon sector. PDVSA is neither a citizen of a State of the United States, nor created under the laws of any third country. Thus, PDVSA is an agency or instrumentality of Venezuela under 28 U.S.C. § 1603(b).

13. Defendant PDVSA Petróleo, S.A. ("PDVSA-P") is an agency or instrumentality of Venezuela. PDVSA-P is incorporated in Venezuela, with its principal executive office at Avenida Libertador, Edificio Pdvsa Torre Oeste, Piso 8, La Campiña, Caracas 1060, Bolivarian Republic of Venezuela. PDVSA-P was created under a resolution of the Venezuelan Ministry of Energy and Mines, and is required to follow the polices, guidelines, and direction of the Venezuelan government, making its activities public in nature. PDVSA-P is governed by public law in Venezuela and Venezuelan law requires that oil and gas, *i.e.*, "hydrocarbon," activities be undertaken for the public welfare and in the social interest. PDVSA-P is the exploration and

operating arm of PDVSA, which, in turn, was created as an instrument of the Venezuelan state's oil policy. PDVSA-P is a wholly owned subsidiary of PDVSA. PDVSA-P is controlled by PDVSA and Venezuela. PDVSA-P is neither a citizen of a State of the United States, nor created under the laws of any third country. Thus, PDVSA-P is an agency, instrumentality, or organ of Venezuela under 28 U.S.C. § 1603(b).

JURISDICTION AND VENUE

14. This Court has subject matter and personal jurisdiction pursuant to 28 U.S.C. § 1330 and 28 U.S.C. § 1602 *et seq.*, including the expropriation exception to immunity under 28 U.S.C. § 1605(a)(3) and the commercial activity exception to immunity under 28 U.S.C. § 1605(a)(2).

15. Venue is proper in this District pursuant to 28 U.S.C. § 1391(d) (authorizing an action against an alien in any district) and 28 U.S.C. § 1391(f)(4) (authorizing civil actions against a foreign state or instrumentality in the District of Columbia).

FACTS COMMON TO ALL COUNTS

A. Plaintiffs' Oil Drilling Business in Venezuela

16. H&P-IDC or its predecessor has been operating in Venezuela through wholly owned subsidiaries — H&P-V and its predecessors — since 1954. H&P-V began performing oil and gas drilling operations for the PDVSA Defendants in the 1970s, and did so continuously until Defendants expropriated H&P-V's business in 2010. From the late 1990s until 2010, H&P-V performed contract

drilling services exclusively for the PDVSA Defendants and their affiliates.

17. H&P-V provided the full range of contractual oil drilling operations to Defendants. Once Defendants selected and prepared the drilling sites, H&P-V transported its drilling equipment to the sites, assembled the drilling rigs and related components, and commenced drilling.

18. The geological conditions and the location of the oil or gas reserves dictate the depth of a well and the type of drilling equipment required to reach the "pay zone" at a given drilling site. In Venezuela, the geological conditions often require deep wells because the "pay zone" can be 18,000 to 22,000 feet below the surface. In light of these conditions, the PDVSA Defendants have required a reliable drilling company with specialized equipment, capable of generating very high horsepower and reaching depths of roughly four miles underground. H&P is one of few such companies in the world, and even fewer operating or willing to operate in Venezuela.

19. President Chávez stated in the Expropriation Decree that "the depth of the wells to be drilled in the national territory . . . and the local geological structures require drilling equipment capable of generating [two to three thousand] horsepower, as well as high mechanical stress." Such equipment is rare and in high demand. As President Chávez recognized in the Expropriation Decree, "[t]he availability of [such] drilling equipment . . . is very low both in the country and at world level, and the lack thereof would affect [Venezuela's national oil drilling] Plan."

20. Defendant PDVSA issued a press statement, dated July 2, 2010, stating that H&P-V's drilling rigs "'are specialized drills we need for more complex sites deeper [sic] . . . The drills will be very useful' . . . According to the depth and geometry of the wells to be drilled . . . there are required teams [sic] of three thousand horsepower capacity, due to high mechanical stress occurring in the area." *See* PDVSA Press Release, An Act of Social Justice Represents Nationalization of Drills (July 2, 2010).

21. In order to meet these drilling requirements, H&P-V obtained from H&P-IDC some of the largest, most powerful, and deepest-drilling, land-based drilling rigs available. Specifically, each of the "big rigs" H&P-V utilized in Venezuela was capable of generating 2,000 to 3,000 horsepower, hoisting up to 1.6 million pounds, drilling to depths of 25,000 to 30,000 feet, and handling the difficult geological conditions in Venezuela. Big rigs are comprised of a complex array of components, generally including among other things, a 160-foot drilling mast or derrick, a large drilling substructure, five 1,200 horsepower engines, a silicon-controlled rectifier or "SCR," several large generators, a top drive, drawworks, hoisting apparatus, blowout preventer, rotating equipment, drillstrings, three 1,600 horsepower mud pumps, 2,000-barrel mud tanks, pipes, hoses, and other parts and equipment.

22. Once the drilling rigs and other components were assembled, H&P-V drilled in stages to pre-set depths thousands of feet below the surface; the final depths of H&P-V's wells were roughly four miles underground. Depending on the conditions, it typically took H&P-V between 6 and 12 months to drill a well.

23. In the final stage of H&P-V's drilling process, H&P-V completed the well so that oil would flow upward in a controlled fashion during an ensuing production phase. It was then possible for the PDVSA Defendants to install their production equipment, open the valves atop the well head, and extract the oil from the new well.

24. Upon completing a well, H&P-V typically disassembled its equipment, transported it to a new drill site designated by the PDVSA Defendants, and reassembled it to begin drilling a new well. It could take up to 30 days or more to move from one drilling site to another. The process of disassembling, transporting, and reassembling each big rig and its components was a very labor-intensive, time-consuming, and expensive process.

25. H&P-V also owned a substantial infrastructure needed to maintain, repair, operate, and transport the drilling equipment to the drilling sites selected by the PDVSA Defendants. This included real property—yards where vehicles could be parked and rigs could be maintained, repaired, upgraded, and stacked; office buildings for company administration; warehouses for spare parts and equipment; and housing and dining accommodations for drilling rig workers and other employees. It also included personal or movable property—more than 100 vehicles to transport employees, parts, and equipment; fire and safety equipment; drilling machinery; furniture and supplies; and a vast inventory of spare parts and other equipment.

26. Defendants have expropriated and now operate all eleven drilling rigs and all of the

supporting infrastructure; yet, they have not paid Plaintiffs for any of it.

27. Until the expropriation occurred, H&P had been among the few companies in the world with the drilling rigs, equipment, infrastructure, employees, and experience necessary to reliably and effectively provide drilling operations in Venezuela.

28. H&P had dutifully performed oil drilling operations for the PDVSA Defendants for years, but the PDVSA Defendants had become increasingly unreliable since President Chávez took office, especially after he quelled a 2002-03 strike at PDVSA, and replaced thousands of PDVSA employees with less experienced workers and executives who were vetted Chávez loyalists.

29. In the years that followed, the PDVSA Defendants took a new approach to the relationship with H&P. Knowing that the government-controlled courts would allow them to do so with impunity, the PDVSA Defendants refused to make timely payments in utter disregard of their contractual obligations. The new approach by the PDVSA Defendants ultimately led to the accumulation of tens of millions of U.S. Dollars in unpaid invoices, the unlawful blockades of H&P-V's yards, and the uncompensated, forcible taking of H&P's entire business in Venezuela.

B. The Drilling Contracts

30. H&P-V's oil drilling contracts and contract extensions covered multi-well, multi-year drilling projects for Defendants. Ten drilling contracts—each

relating to a different H&P-V rig[1]—are at issue in this action:

Contract No. 4600013176: Rig HP-160

Contract No. 4600016461: Rig HP-135

Contract No. 4600017135: Rig HP-113

Contract No. 4600017140: Rig HP-115

Contract No. 4600017141: Rig HP-127

Contract No. 4600017142: Rig HP-128

Contract No. 4600017143: Rig HP-129

Contract No. 4600017145: Rig HP-150

Contract No. 4600017146: Rig HP-153

Contract No. 4600017147: Rig HP-174.[2]

31. H&P negotiated the contracts with the regional division of the PDVSA Defendants located in the region where the respective drilling rigs were intended to operate. H&P negotiated one contract (Contract No: 4600016461) with the Western Division of the PDVSA Defendants and the other

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[1] H&P had an eleventh rig operating in Venezuela during the relevant time period, which also was expropriated by Defendants. That rig—Rig H&P 116—was under contract to a different Venezuelan government-owned oil company, Boqueron, S.A. That contract is not within the scope of this Complaint.

[2] The contracts enumerated in paragraph 30 and their attachments and amendments are hereby incorporated by reference. Plaintiffs have not attached the contracts to the Complaint, to avoid inconvenience to the court and parties, because the originals are in Spanish and too voluminous when accompanied by English translations. Plaintiffs will submit the contracts and translations upon request or at an appropriate time.

nine contracts with the Eastern Division of the PDVSA Defendants.

32. PDVSA-P signed each drilling contract.

33. All ten contracts were for a "fixed term," meaning that they expired at the conclusion of an agreed-upon period unless the parties agreed to an extension or an extension occurred by the contract's original terms. For example, some of the contracts required completion of any well still in progress at the conclusion of the original contractual term, and extended the contract automatically through such well's completion.

34. The parties anticipated that all ten contracts would be extended beyond their original terms, as had occurred with prior contracts for many years prior to the confiscation of H&P's business; hence, the contracts contained renewal or extension provisions. The ten contracts at issue were originally signed in 2007 for initial periods ranging from five months to one year, but all ten contracts were subsequently extended for additional periods.

35. As is customary in the industry, all ten contracts provided for H&P-V's drilling operations to be performed on a "day-rate" contract basis. Pursuant to this arrangement, in exchange for providing drilling equipment and operations to the PDVSA Defendants, the PDVSA Defendants agreed to pay H&P-V a fixed rate per day that the drilling rig was in operation (the "day rate" or "daily rate").

36. Alternative daily rates were also agreed upon and set forth in each contract to cover periods during which H&P-V performed operations other than drilling, such as waiting for materials, repairing drilling rigs, transporting drilling rigs

between wells, and mobilizing or demobilizing the drilling rigs.

37. The agreed-upon daily rates for H&P-V, which are set forth at Exhibit E of each contract, were partially set forth in U.S. Dollars and partially in Venezuelan currency ("Bolivars" or "Bolivar Fuertes").[3] The value of the applicable daily rates varied from contract to contract, with fluctuations in exchange rates, and as the parties renegotiated the rates over time. Typically, the proportion of the applicable daily rates denominated in U.S. Dollars exceeded the proportion denominated in Bolivars.

38. H&P-V separately invoiced the amounts due in U.S. Dollars ("Dollar-based invoices") and the amounts due in Venezuelan currency ("Bolivar-based invoices")

39. H&P-V's single contract with the PDVSA Defendants in the western region (Contract No. 4600016461) expressly set forth that H&P-V's Dollar-based invoices would be paid by PDVSA-P in U.S. Dollars in the United States whenever the foreign exchange control measures in effect in Venezuela prevented H&P-V from exchanging local currency for U.S. Dollars, as necessary to meet certain U.S. Dollar obligations outside of Venezuela. Contract No. 4600016461, § 18.14 ("If as a result of the exchange control measures established by the competent authorities, [H&P-V] is unable to obtain

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[3] The Bolivar was converted to a new currency—the "Bolivar Fuerte"—effective January 1, 2008, after the initial contracts at issue were signed. The Bolivar Fuerte was worth 1,000 Bolivars, such that overnight the exchange rate to U.S. Dollars went from 2,150:1 (Bolivars to Dollars) to 2.15:1 (Bolivar Fuertes to Dollars).

in a timely fashion the foreign currency required to perform its obligations abroad related to the performance of this CONTRACT, [PDVSA-P] agrees to pay in United States dollars the portion of the price of this CONTRACT set in said currency . . . ."). This condition was met throughout the relevant period. Thus, PDVSA-P was obligated to make payments to H&P in U.S. Dollars under Contract No. 4600016461.

40. The nine contracts with the PDVSA Defendants in the eastern region were supplemented by a written agreement applicable to each contract—between H&P-V and PDVSA on behalf of itself and PDVSA-P—under which the PDVSA Defendants PDVSA agreed to pay 61% of H&P-V's Dollar-based invoices in U.S. Dollars to H&P-V's designated bank account in Tulsa, Oklahoma, while retaining discretion to pay the remaining 39% of H&P-V's Dollar-based invoices in Bolivars to H&P-V's designated bank account in Caracas, Venezuela (the "61-39 agreement").

41. The 61-39 agreement is dated June 2, 2008, and signed by representatives of H&P-V and PDVSA. It provides: "The invoices issued corresponding to the contract's foreign currency component . shall be paid in actual U.S. dollars at 61%. This payment shall be made abroad in the account specified by the contractor. . . . The remaining portion, 39%, shall be paid in equivalent bolivars at the official exchange rate."

42. The contracts also contain provisions governing the payment of reimbursable expenses incurred by H&P-V. The contracts required the PDVSA Defendants to reimburse certain expenses,

without limitation, in the same currency in which those expenses were incurred by H&P-V.

43. Moreover, each of the ten contracts at issue expressly required, in Exhibit E, that payments made by the PDVSA Defendants in U.S. Dollars be sent directly to H&P-V's designated bank account at the Bank of Oklahoma in Tulsa, Oklahoma. Thus, under each of the contracts at issue, the PDVSA Defendants were required to make payments to H&P-V in U.S. Dollars directly to H&P-V's designated bank account at the Bank of Oklahoma in Tulsa, Oklahoma. Each of the contracts also required that payments made by the PDVSA Defendants in Bolivars be sent directly to H&P-V's bank account at the Mercantil Bank in Caracas, Venezuela.

44. Until the PDVSA Defendants stopped making payments entirely in 2010, they approved invoices issued by H&P-V requiring payment in U.S. Dollars to H&P-V's designated bank account in Tulsa, Oklahoma, pursuant to the 61-39 agreement, and paid many but not all of the invoices in the United States—albeit often late. Specifically, during the relevant time period, the PDVSA Defendants made at least 55 payments totaling roughly $65 million into H&P-V's designated bank account in Tulsa.

45. According to the agreed-upon invoicing process, H&P-V issued pro forma invoices, which the PDVSA Defendants were required to approve and return within a certain period, specifying any disputed line items. In some cases, H&P-V rejected the proposed changes and insisted upon payment; in others, H&P-V issued a new invoice that included

only the undisputed line items. Invoices were due to be paid within 30 calendar days of receipt by the PDVSA Defendants.

C. The PDVSA Defendants' Breaches of Contract

46. Starting in 2007, the PDVSA Defendants fell substantially behind in their payments to H&P-V. By August 2008, H&P-V's receivables balance under the contracts at issue had reached $63 million.

47 In an attempt to address the overdue receivables and protect H&P-V's liquidity, H&P repeatedly sought and held meetings with the PDVSA Defendants to address the outstanding invoices.

48. These meetings occurred frequently, sometimes as often as one or more times per month. At these meetings, the PDVSA Defendants never denied that they owed the amounts set forth by H&P. To the contrary, the PDVSA Defendants acknowledged their debt and provided assurances that payment on the outstanding invoices—which the PDVSA Defendants had in many cases already pre-approved—was forthcoming.

49. Notwithstanding the PDVSA Defendants' repeated assurances, H&P-V's overdue receivables balance under the contracts at issue continued to climb throughout 2008. By January 2009, it was approaching $100 million.

50. In its earnings release dated January 29, 2009, H&P, Inc. announced that it would "cease[] operations on rigs as their drilling contracts expire" and not renew its subsidiary's contracts with the PDVSA Defendants absent an "improvement in

receivable collections." H&P took this step to avoid continuing to perform work and incur expenses without compensation.

51. For their part, the PDVSA Defendants continued to fail to make payments to H&P-V as invoices became due. As a result, H&P-V's receivables under the contracts at issue continued to climb, exceeding $113 million by June 2009.

52. Despite the PDVSA Defendants' failure to perform in good faith and pay outstanding receivables, H&P-V finished its drilling obligations. Upon completion of its drilling obligations, and as the contracts were expiring, H&P began winding down its operations in the first half of 2009. Throughout this period, H&P continued to negotiate in good faith to achieve: (1) payment of the PDVSA Defendants' outstanding debt to H&P and (2) resumption of drilling operations to make use of the idled rigs. H&P made clear to the PDVSA Defendants that it would not enter into new contracts or restart drilling operations unless the PDVSA Defendants paid a substantial amount of their outstanding debt—including the U.S. Dollar component payable in the United States.

53. By November 2009, H&P-V had fulfilled each and every contractual obligation it had under each of the drilling contracts. Upon completion of each contract, H&P-V disassembled the drilling rig and components, transported it, and stacked it in H&P-V's yards, pending substantial payment by the PDVSA Defendants.

54. In early 2010, Venezuela devalued its currency by a 2-to-1 ratio. Because a portion of H&P-V's accounts receivable from the PDVSA

Defendants were denominated in Bolivar Fuertes, this devaluation drastically reduced the value of that portion of H&P-V's accounts receivable.

55. Discussions between H&P and the PDVSA Defendants culminated in a meeting held on May 24, 2010 at the headquarters of PDVSA's subsidiary, CITGO Petroleum Corporation, in Houston, Texas. The parties failed to resolve their differences. Once again, the PDVSA Defendants did not contest the amount past due to H&P-V. Nonetheless, they rejected H&P's proposed payment plan and failed to offer a payment plan of their own. H&P declined to enter into any new contracts until it received a substantial payment for unpaid invoices in connection with the drilling operations performed under the old contracts.

56. The PDVSA Defendants have not remitted any payments to H&P-V in the United States since March 2010, and they have not remitted any payments to HP-V in Venezuela since May 2010. The total amount of their outstanding debt to H&P-V, under the contracts at issue, is currently at least $32 million. This amount includes invoices that the PDVSA Defendants pre-approved for payment in U.S. Dollars to H&P-V's designated account in Tulsa, Oklahoma.

57. H&P-V has fully performed under each of the contracts at issue.

58. The PDVSA Defendants are in breach of each of the contracts with H&P-V

D. Defendants' Expropriation of H&P's Business in Venezuela

59. On or about June 12, 2010 — more than two weeks prior to the National Assembly's "Bill of Agreement" and President Chávez's decree— employees of the PDVSA Defendants surrounded and unlawfully blockaded the business premises of H&P-V's drilling operations in Ciudad Ojeda, in the western region of Venezuela.

60. On or about June 13 and 14, 2010, armed and uniformed soldiers of the Venezuelan National Guard and employees of the PDVSA Defendants surrounded and unlawfully blockaded the business premises of H&P-V's drilling operations in Anaco, in the eastern region of Venezuela, which was H&P-V's headquarters in Venezuela.

61. On information and belief, the Venezuelan National Guard and the employees of the PDVSA Defendants were sent without legal authority at the direction of Defendant Venezuela, acting through President Chávez or his ministers - for the unlawful purposes of blockading and seizing H&P-V's assets, preventing any assets from being taken out of H&P-V's yards, and intimidating H&P-V into entering into new drilling contracts and forgiving the debt of the PDVSA Defendants.

62. H&P personnel were permitted to enter and exit, but were not permitted to remove any of H&P's property from the yard. Armed soldiers from the Venezuelan National Guard searched H&P vehicles and personnel as they exited the yard.

63. PDVSA's Director of Services expressly informed H&P-V's Administrative Manager that Defendants intended the blockade to prevent H&P-V

from removing its rigs and other assets from its premises, and to force H&P-V to negotiate new contract terms immediately. Among the demands the PDVSA Defendants asserted at this time was a demand that H&P-V forgive the outstanding debt by retroactively renegotiating the contracts' price terms.

64. On June 17, 2010, citing the stress on H&P personnel, H&P's Administrative Manager asked PDVSA officials to end the blockade, reduce the number of people involved, and/or cease the restrictions. No change occurred.

65. On June 23, 2010—nearly a week prior to the National Assembly's "Bill of Agreement" and President Chávez's Expropriation Decree—PDVSA issued a press release stating that "[t]he Bolivarian Government, through Petroleos de Venezuela SA (PDVSA) nationalized 11 drilling rigs" belonging to "the company Helmerich & Payne (HP), a U.S. transnational firm." PDVSA Press Release, Venezuela Will Assume Sovereign Control of 11 Drilling Rigs (June 23, 2010).

66. Two days later, on June 25, 2010—still prior to the "Bill" and the decree—PDVSA issued a press release titled, "Our workers have in custody the drilling rigs." That release states in part:

> The Bolivarian Government, through Petróleos de Venezuela (PDVSA), continues on his [sic] sovereign action to recover 11 drilling rigs from the company Helmerich & Payne (H&P) . .
>
> "The workers are guarding the drills," said the People's Minister for Energy and Petroleum and President of PDVSA, Rafael Ramírez . . .

> The nationalization of the oil production drilling rigs from the American contractor H&P not only will result in an increase of oil and gas production in the country, but also in the release [sic] of more than 600 workers and the increase of new sources of direct and indirect employment in the hydrocarbon sector.

PDVSA Press Release, Our Workers Have in Custody The Drilling Rigs (June 25, 2010).

67 On June 29, 2010—more than two weeks after Defendants began their ongoing illegal blockades and effectively seized H&P's ongoing Venezuelan business—Defendant Venezuela, acting through the Venezuelan National Assembly, declared that the taking of all eleven of H&P's oil drilling rigs and associated property would be of "public benefit and good," and recommended to the "National Executive" that it issue a "Decree of Expropriation."

68. Later that same day, on June 29, 2010, Defendant Venezuela, acting through President Chávez, issued the Expropriation Decree, presidential decree number 7532. President Chávez's decree authorized the "forcible taking" of H&P's assets, including all eleven drilling rigs, and "all the personal and real property and other improvements made by [H&P]." It declared that "[t]he expropriated property will become the unencumbered and unlimited property of PDVSA, S.A., or its designee affiliate, as expropriating entity," and it directed Defendant PDVSA to "commence and carry out the expropriation procedure."

69. According to the decree, the purpose of the taking was to "safeguard commercial policies," "defend the economic activities of national public and private companies," and enable "PDVSA, its affiliates, and [related] mixed companies" to meet their "production plans and targets." In short, it was intended to advance the commercial interests of the Defendants.

70. The decree asserted that the drilling rigs were "vital" to Defendants because "the depth of the wells to be drilled in the national territory and the local geological structures require drilling equipment capable of generating [two to three thousand] horsepower, as well as high mechanical stress" and "[t]he availability of [such] drilling equipment . . is very low both in [Venezuela] and at world level."

71. That same day, on June 29, 2010, the PDVSA Defendants announced that a notary public would conduct a judicial inspection of the rigs and other assets at the Anaco yard (but apparently not the yard in Ciudad Ojeda). Given the uncertainty as to whether H&P would ever again have access to its property, H&P-V hired a notary to accompany the PDVSA Defendants' notary; H&P-V's notary simultaneously performed a rushed and incomplete inspection in the limited time available that day

72. On July 1, 2010, PDVSA-P filed, in the Venezuelan civil judicial court of El Tigre, an eminent domain proceeding relating to the ten drilling rigs and related real and personal property confiscated in Anaco, in the east. More than a year has passed since PDVSA-P's filing of that case, but the initial "notice" or "edict" in that case still has not

been published; as a result, the process has been stalled for more than a year and H&P-V still has not been afforded the opportunity to appear.

73. On July 1, 2010, PDVSA-P also filed, in the Venezuelan civil judicial court of Cabimas, an eminent domain proceeding relating to the one drilling rig and related real and personal property confiscated in Ciudad Ojeda, in the west. In that case, eight months passed before the initial "notice" or "edict" was published on March 1, 2011; although H&P-V subsequently appeared and was made a party, those proceedings have not progressed past the earliest stage of the case.

74. The next day, on July 2, 2010, Minister/President Ramírez announced the purportedly official seizure of the drilling rigs and all other real and personal property held by H&P-V

75. The seizure constituted a taking of the entirety of H&P's Venezuelan business operations, including all of its personal and real property, oil drilling rigs and equipment, vehicles, office equipment and other physical assets.

76. On information and belief, from the time of that seizure, the PDVSA Defendants have been operating H&P-V's Venezuelan business as a going concern—employing not only the real and personal property but also H&P's drilling rig managers, drilling rig workers, and other professionals who were trained by, and formerly worked for, H&P-V

77. As documented by the notary on June 30, 2010, the expropriated assets from the Anaco yard in the east include, among other things, ten drilling rigs and related components, derricks, storage tanks, funnels, pumps, blowout preventer valves, cables,

pipes, and tools. These drilling rigs and related parts were all in a good, operational state when they were confiscated.

78. The expropriated assets from the Ciudad Ojeda yard in the west include, among other things, one drilling rig and the related components, parts, and equipment. That drilling rig and its related parts were also in a good, operational state when they were confiscated.

79. A substantial amount of other equipment, property, and infrastructure was also taken from H&P-V For example, there were, among other things, dozens of trucks, vehicles, forklifts, ambulances, firefighting equipment, fans, motors, hoses, valves, tires, storage tanks, pumps, generators, and other parts and equipment. After the taking, on information and belief, Defendants simply repainted H&P-V's cars, trucks, and other equipment with their own PDVSA colors and logos.

80. The scope of the taking also included substantial real property in Anaco, including various trailers used as offices, cooking and dining facilities, and bedrooms; eight houses and one clubhouse; warehouses for spare parts and equipment; and four office buildings—two for administrative functions, one for human resources, and one for medical services. There were confidential files in the office buildings, but even many of those were taken by Defendants.

81. Stripped of all of its productive assets, H&P-V ceased to operate and no longer exists as a going concern. Defendants took the entire business, which they now operate as a state-owned commercial enterprise.

82. Defendants themselves have publicly stated that they intentionally took "the company" when they took its assets. For example, during his speech on July 2, 2010, Minister/President Ramírez proclaimed that "the Venezuelan Government, through its appropriate authorities, is taking over this drill company which has been nationalized by the revolution."

83. A PDVSA press release, dated July 2, 2010, states that "Minister Ramírez explained that this action will guarantee that the drills will be operated by PDVSA as a company of all Venezuelans, it also ensures the rights of former employees of H&P, who . . . now . . . will become part of PDVSA."

84. Defendants' rhetoric and conduct demonstrates that the business was taken by Defendants for the purpose of turning it into a state-owned and state-operated enterprise. On information and belief, Defendants currently employ H&P-V's assets and former employees to provide drilling and other services that H&P-V once provided in Venezuela. In short, Defendants now operate the assets and the going concern they took from H&P.

85. H&P no longer possesses any significant tangible property or maintains any commercial operations in Venezuela. Having suffered the expropriation of an entire company without compensation, H&P has suffered a loss that is cognizable under international law in a U.S. court.

E. Defendants' Failure To Compensate Plaintiffs For The Expropriation

86. Defendants have failed to provide any compensation, much less just compensation under international law. For compensation to be "just"

under international law, it must be "prompt, adequate, and effective."

87. Although more than a year has passed since PDVSA-P filed two eminent domain actions relating to the confiscation of H&P-V's assets in the east and west regions, no meaningful progress has been made. In the El Tigre proceedings in the East, H&P-V still has not been served or made a party to the case. In the Cabimas proceedings in the West, H&P-V still is in the initial stage of the case, which has stalled indefinitely. On information and belief, the Defendants and their courts control the pace of these proceedings, and have little or no incentive to move the process along.

88. Even if these cases were allowed to proceed, H&P would never receive due process, much less a fair judgment on the prompt, adequate, and effective compensation to which they are entitled under international law.

89. In a recent sworn declaration submitted in another U.S. litigation, a Venezuelan legal scholar provided his expert opinion regarding the decisions of Venezuela's Political-Administrative Chamber of the Supreme Tribunal of Justice, the highest court responsible for deciding appeals of cases brought by private parties against the government for "damages and other compensation." He studied the decisions of the Political-Administrative Chamber during the 2007-08 time period and found the following:

- The Chamber decided 89 contract cases brought by private parties against the Venezuelan government - and the Venezuelan government prevailed in all 89 cases.

- The Chamber decided 5 contract cases brought by the Venezuelan government against private parties—and the Venezuelan government prevailed in all 5.
- The Chamber decided 366 petitions by private parties to nullify an administrative act of the Venezuelan government and/or seek damages—and the Venezuelan government prevailed in 365 out of 366 cases. The only case to be decided for a private party "was later annulled by the Constitutional Chamber of the Supreme Tribunal of Justice, by using a special power that had never been used in Venezuelan judicial history."

Based on these and other data, the legal scholar stated: "[T]he conclusion seems obvious: the Venezuelan contentious-administrative courts are not willing to rule against the State in any case." *See* Decl. of Antonio Conova González at 10, *Northrop Grumman v. Ministry of Defense*, ECF No. 160-3, Case 1:02-cv-00785-WJG-JMR, Dkt. (S.D. Miss. filed Dec. 7, 2009). Similar conclusions are echoed by a broad spectrum of authorities. According to the U.S. Trade Representative, although the Venezuelan government has nationalized "[s]eventy-six companies, including several U.S.-owned firms," pursuant to a May 2009 law relating to hydrocarbons, "none have received compensation to date." U.S. Trade Representative, 2011 National Trade Estimate Report on Foreign Trade Barriers (Mar. 2010); *see also* Bureau of Economic, Energy and Business Affairs, U.S. Department of State, *2011 Investment Climate Statement: Venezuela* (March 2011) (stating that it "do[es] not believe that any

compensation has been paid to date" to these nationalized companies).

90. According to the U.S. Department of Commerce, Defendant Venezuela "maintains that it will compensate for nationalizations," when, in reality, it has "seldom paid" any compensation to companies whose assets have been seized in recent years. *See* U.S. Department of Commerce, *Doing Business in Venezuela: 2011 Country Commercial Guide for U.S. Companies*, at Ch. 6.

91. The U.S. Department of State reports that "of the companies with U.S. ownership whose assets have been seized over the past couple of years, President Chávez has offered compensation but has seldom paid, often forcing companies to seek settlement through international arbitration." Bureau of Economic, Energy and Business Affairs, U.S. Department of State, *2011 Investment Climate Statement: Venezuela* (March 2011).

92. According to Venezuela's Association of Urban Property Owners ("APIUR"), the Venezuelan government has paid compensation to only 5% of the 280 "urban property owners" whose property it nationalized between 2008 and 2011. Ultima Hora, *95% de Inmuebles Expropiados No Han Sido Pagados* (Jan. 10, 2011).

93. The World Economic Forum, which ranks Venezuela the *worst country in the world* in terms of property rights, judicial independence, and the efficiency of the legal framework for challenging government action, has recognized the "scarce propensity of the [Venezuelan] government to pay reasonable compensation in the case of expropriation." *See* World Economic Forum, *The*

Global Competitiveness Report, 2011-2012; *World Economic Forum Report: Benchmarking National Attractiveness for Private Investment in Latin American Infrastructure* (2007).

94. The Heritage Foundation, in its most recent Index of Economic Freedom report, similarly found that "[l]and and other private holdings are expropriated by the [Venezuelan] government arbitrarily and without *compensation*." Heritage Foundation, *2011 Index of Economic Freedom Venezuela* (emphasis added); *see also* The Economist: *Expropriations in Venezuela: Full Speed Ahead* (Oct. 29, 2010) (noting that although, [l]egally, before a company can be nationalised, the legislature must declare the expropriation 'in the public interest,' and the target is entitled to present a defence and receive fair and prompt compensation," but that *"[n]one of this happens in practice."* (emphasis added)).

95. In short, Venezuela does not pay prompt, adequate, or effective compensation to those whose property it confiscates. Moreover, due to the absence of judicial independence in Venezuela, most plaintiffs—especially American companies—in practice have no legal recourse through the courts of Venezuela. As set forth below, Venezuelan courts are politically dominated by the Executive and do not provide impartial justice in any case in which the government has an interest, including expropriation cases. As Defendants are well aware, Plaintiffs will never receive prompt, adequate, and effective compensation in Venezuelan proceedings.

96. Moreover, compensation in any amount awarded by a Venezuelan court would be inherently inadequate because it would not actually be paid by

the Venezuelan political branches; and, even if it were paid, it would be in a non-convertible currency, which is inadequate under international law.

F. Defendants' Discriminatory Conduct

97. H&P's property was targeted and confiscated in part because of H&P's U.S. ownership and identity.

98. In seizing H&P-V's assets, Minister/President Ramírez condemned "this American company" and its "foreign gentlemen investors."

99. Under Venezuelan law, various restrictions are placed on foreign investors, including limits on the types of industries in which they can invest.

100. Venezuelan law also requires foreign investors to register their investments in Venezuela with the Superintendent of Foreign Investment (*i.e.*, the "Superintendencia de Inverseiones Extranjeras" or "SIEX"), which is part of the Venezuelan Finance Ministry. Venezuelan law defines "foreign investment" broadly to include, among other things, "[c]ontributions from abroad, coming from foreign persons or companies, destined to the capital of a company, in freely convertible currency or in physical and tangible assets such as: industrial plants, new or refurbished machinery, spare parts, raw material and intermediate products."

101. As part of the registration process, foreign investors must file with SIEX a Foreign Investment Application Form ("Solicitud de Registro o Actualizacion de Inversion Extranjera"). Similarly, the company receiving the "foreign investment" must file with SIEX a Company Qualification Application

form ("Solicitud o Actualización de Constancia De Calificacion De Empresa"). H&P-IDC and H&P-V regularly complied with these requirements.

102. Based on the rules governing foreign investment—and the fact that H&P-V is 100% U.S.-owned—the Defendants have deemed H&P-V to be a "foreign" company for purposes of Venezuelan law. The Company Qualification Certificate that SIEX issued to H&P-V states that "100% of the capital of [H&P-V] is property of [H&P-Int'l]." It also states that all of H&P-V's board members are "U.S. citizen(s)" and identifies them by name. Finally it states that "[H&P-V] is accordingly considered a FOREIGN COMPANY at all relevant legal effects."

103. H&P-V thus was and is deemed to be a "foreign company" for all legal purposes, because 100% of its capital came from foreign investment received from its U.S. parent corporation, H&P-IDC.

104. As a result of their character as U.S. entities, H&P-IDC and H&P-V have been subjected to discriminatory treatment by Defendants.

105. On the day that the Venezuelan National Assembly declared H&P-V's oil drilling rigs to be public property belonging to the state, Jesus Graterol, a Deputy in the Venezuelan National Assembly and President of the National Assembly's Committee on Energy and Mines, criticized opponents of the nationalization as acting "in accordance with the instructions of the [U.S.] Department of State" on behalf of H&P, and trying to "subsidize the big business transnational corporations, so that they can promote what they know best to do, which is war, . . . through the large military industry, of the Empire and its allies." *See*

Translation of Interview on Venezuelan VTV Television Network, June 29, 2010, *available at* http://www.youtube.com/watch?v=_jbI5514HRw.

106. A Venezuelan state reporter publicly summarized the debate in this way: "We remind you that at this time the debate continues to issue the declaration of public interest of these eleven American rigs, which, should this motion be approved, would then become part of the energy machinery of Socialist Petróleos de Venezuela." *See* Translation of Interview on Venezuelan VTV Television Network, June 29, 2010, *available at* http://www.youtube.com/watch?v=_fjbI5514HRw.

107. A PDVSA press release condemned H&P, calling it a "U.S. transnational firm." *See* PDVSA Press Release, Recovered Drilling Rig Will Begin Operations in Monagas (July 16, 2010).

108. Another PDVSA press release discusses the "nationalization of the oil production drilling rigs from the USA company contractor H&P" and "emphatically rejects statements made by spokesmen of the American empire-traced [sic] in our country by means of the oligarchy." *See* PDVSA Press Release, Petróleos de Venezuela Informs the Venezuelan People (June 25, 2010).

109. Yet another PDVSA press release announces that "Minister Ramírez explained that this action will guarantee that the drills will be operated by PDVSA as a company of all Venezuelans, it also ensures the rights of former employees of H&P, who a year ago were exploited and then dismissed by this American company, but now they will become part of PDVSA." *See* PDVSA Press Release, An Act of Social

Justice Represents Nationalization of Drills (July 2, 2010).

110. President Chávez and the Venezuelan government have expressed their overriding hostility toward the United States. As reported by the U.S. Department of Commerce, "[t]he political relationship between Venezuela and the U.S. is characterized by harsh anti-U.S. rhetoric by President Hugo Chávez." *See* U.S. Department of Commerce, *Doing Business in Venezuela: 2011 Country Commercial Guide for U.S. Companies*. As reported by the U.S. Department of State:

> U.S.-Venezuelan relations have been tense in recent years . . . . President Chávez continues to define himself in opposition to the United States, using incendiary rhetoric to insult the U.S. Government and U.S. influence in Latin America. President Chávez ordered the expulsion of the U.S. Ambassador on September 11, 2008 . .

See Background Note: Venezuela (Feb. 8, 2011), available at: *http://www.state.gov/r/pa/ei/bgn/35766.htm*.

111. In September 2008, President Chávez ordered the expulsion of the U.S. ambassador, accused the United States of trying to start a coup and declared that the United States should "[g]o to hell a hundred times." The Guardian, Venezuela: Hugo Chávez Expels U.S. Ambassador Amid Claims of Coup Plot (Sept. 12, 2008). In September 2009, Chávez gave a speech in which he declared that the United States is "the greatest terrorist in world history," adding that the "Yankee empire will fall. It's already falling, and will disappear from the face

of the Earth, and it's going to happen this century." Russia Today, Hugo Chávez Kicks Off Russian Visit with Emotional Speech at Moscow University (Sept. 10, 2009).

112. Venezuela's anti-U.S. rhetoric and conduct extends to U.S. companies. The U.S. Department of Commerce reports the rising incidence of "anti-U.S. company bias in government procurements" and "active discrimination against American products by government agencies and government-owned companies." *See* U.S. Department of Commerce, *Doing Business in Venezuela: 2011 Country Commercial Guide for U.S. Companies* (March 2011). The U.S. Department of Commerce also warns U.S. exporters and investors in Venezuela to proceed cautiously in light of current conditions, including "anti-market orientation, and virulent anti-U.S. rhetoric" in Venezuela. *Id.*

113. "[V]irulent anti-U.S. rhetoric," has been directed at specific U.S. companies in addition to H&P. For example, when ExxonMobil suffered a legal setback in a case against Venezuela, President Chávez declared it a "victory over the empire that fills us with national pride." *See* PDVSA Press Release, Hugo Chávez: A Victory Over The Empire That Fills Us With National Pride (March 25, 2008). When the U.S. Department of State issued a statement in support of that U.S. company, Minister/President Ramírez described it as "an act of economic warfare" and accused this "transnational elite company" of "maneuver[ing]" on behalf of the U.S. Government. *See* PDVSA Press Release, Behind ExxonMobil's Maneuvers is the United States Government" (Feb. 13, 2008).

114. Antipathy to the United States and American companies pervades other aspects of President Chávez's government, including its foreign policy. For example, Chávez has developed closer relationships with those countries that pose the biggest security threats to the United States, including Iran and Syria, two U.S.-designated state sponsors of terrorism. The U.S. Department of State reports that "President Chávez has deepened relations with Iran . . . by signing multiple economic and social accords and publicly supporting Iran's controversial nuclear program." *See* Background Note: Venezuela (Feb. 8, 2011), available at: *http://www.state.gov/r/pa/ei/bgn/35766.htm*. He refers to Iran as a close "strategic ally," condemns U.N. Security Council Resolutions that impose sanctions on that country, and recently asserted that the Venezuelan Government "will back Iran under any circumstances and without conditions." *Id.* President Chávez has also formed closer ties with North Korea and Syria. *Id.*

G. Direct Effects in the United States

115. The PDVSA Defendants' breaches of contract—and refusal to make contractually obligated payments—have had direct and immediate effects in the United States, including payments that the PDVSA Defendants were obligated to make in the United States but failed to make, H&P-V's inability to declare and remit dividends to its U.S. parent corporation, and a profound alteration of H&P-IDC's management and support of H&P-V

116. *Obligations to make payment in the United States.* The contracts, parties' course of conduct, and contemporaneous documents reflect the obligations

of the PDVSA Defendants to make payments in U.S. Dollars into a designated bank account in Tulsa, Oklahoma. When the PDVSA Defendants breached their contractual obligations, the failure to make required payments into the previously designated Tulsa, Oklahoma bank account had a direct effect in the United States.

117. Consistent with their obligations under the contracts, pertinent amendments, and agreements, the PDVSA Defendants made numerous payments into the Tulsa, Oklahoma bank account. When the PDVSA Defendants breached their contractual obligations, payments that were to have been made to the bank account in Tulsa, Oklahoma were not made, having a direct effect in the United States.

118. The PDVSA Defendants' agreement to pay a portion of the contracts in U.S. Dollars into a designated U.S. bank account is reflected not only in the drilling contracts but also in meeting minutes, dated June 2, 2008, that memorialize that agreement and are signed by both PDVSA and H&P-V. This 2008 agreement reiterated the terms of an earlier 2003 agreement, which similarly provided for a set percentage of the PDVSA Defendants' payments to be remitted in U.S. Dollars to a bank account in the United States.

119. The parties' invoicing practice also reflected the payment of U.S. Dollars in the United States. The process of payment began with H&P-V's issuance of a pro forma. Where required in light of the services specifically invoiced, the pro forma invoices issued by H&P-V reflected a demand for payment in U.S. Dollars, which were to be remitted to the United States under the contracts. The

PDVSA Defendants then reviewed and approved these pro forma invoices, at which point H&P-V issued an invoice. Numerous pro formas and final invoices confirm that the PDVSA Defendants accepted and—for a time—complied with its obligations to remit payments to the United States under each of the contracts at issue.

120. The PDVSA Defendants also instituted a mechanism to verify that, from their perspective, the payments made in U.S. Dollars, paid in the United States, did not exceed the contractually required levels. These so-called "dollar audits" were conducted by the PDVSA Defendants into 2009. The PDVSA Defendants' failure to make the required U.S. Dollar payments into the designated bank account in the United States had a direct effect in the United States.

121. *Dividends.* H&P-V was part of an integrated corporate structure, wholly owned by H&P-IDC—a U.S. corporation—which is, in turn, wholly owned by H&P, Inc.—a U.S. corporation listed on the New York Stock Exchange. Throughout the contractual relationship with the PDVSA Defendants, H&P-V remitted or attempted to remit dividends to H&P-IDC, its U.S.-owned, U.S. parent corporation in the United States.

122. H&P-V was expected to declare and remit dividends to H&P-IDC in the United States, and had an established practice of doing so, including in 2005 and in 2007. As recently as 2008, H&P-V declared a dividend to be remitted to H&P-IDC, its parent company in the United States, and sought to have that dividend paid in U.S. Dollars in the United States pursuant to the expectation of its U.S. parent

company. The PDVSA Defendants' breaches of the contracts meant that dividends to be declared and remitted in the United States were not declared and/or remitted, and thus, had a direct effect on H&P-IDC, the U.S. parent corporation in the United States.

123. *Third Party Contracts.* H&P-V depended on the influx of materials, services, and personnel from the United States in order to perform its contract oil and gas drilling operations for the PDVSA Defendants in Venezuela.

124. H&P-V routinely entered into third-party agreements with vendors, suppliers, and services companies in the United States, for the purpose of delivering goods and services from the United States to Venezuela to permit H&P-V to perform its contracts with the PDVSA Defendants.

125. Payments for these third-party contracts often had to be made by H&P-V in U.S. Dollars in the United States.

126. The PDVSA Defendants' failure to honor their contractual payment obligations to H&P-V directly impacted H&P-V's ability to make these payments, as well as the relationships and obligations that H&P-V had with third-party vendors and service providers in the United States. Because H&P-V was left without funds to pay the third parties in the United States in U.S. Dollars, H&P-IDC advanced the money in the form of corporate debt, issued payments, and maintained accounts and records to reflect H&P-V's liabilities to H&P-IDC.

127. When, as a result of the PDVSA Defendants' breaches of contract, H&P IDC was compelled to pay third party vendors on H&P-V's behalf, H&P-IDC

suffered direct out-of-pocket losses in the United States.

128. There were direct effects in the United States when the PDVSA Defendants refused to pay H&P-V as agreed and, as a result of that refusal to pay, H&P-V was unable to meet its payment obligations to third parties in the United States, and H&P-IDC was compelled to loan money to H&P-V and make payments to third parties on H&P-V's behalf.

129. *Direct Effects on H&P-IDC in the United States.* Plaintiff H&P-IDC, as parent corporation to H&P-V, provided significant managerial, technical, and other support throughout H&P-V's operations in Venezuela, and expected H&P-V to remit dividends in return. H&P-IDC acquired, sold, and shipped from the United States parts and equipment for the maintenance, repair, and servicing of the drilling rigs and related machinery in Venezuela.

130. H&P-IDC provided management guidance and oversight, as well as logistical support from the United States.

131. H&P-IDC provided or facilitated legal, accounting, compliance, human resources, information technology, internal auditing, purchasing, health and safety, and other back-office support from the United States. Some of H&P-V's officers and senior managers were on the U.S. Dollar, U.S.-based payroll of H&P-IDC.

132. H&P-IDC reviewed and approved strategic and important management and operational decisions taken by H&P-V. These decisions included, for example, whether to make or liquidate capital investments, whether and when to move rigs and

other assets from one region to another or into or out of Venezuela, and whether and when to enter into new contracts or extend existing contracts.

133. When the PDVSA Defendants breached their contractual obligations, H&P-V was compelled to idle its rigs in Venezuela. H&P-IDC and third parties, in turn, stopped selling and shipping parts and equipment for the maintenance, repair, operation, and servicing of the drilling rigs, directly affecting the operations and bottom line of H&P-IDC and third parties in the United States.

134. Due to the breaches of contract, H&P-V stopped purchasing the parts, equipment, and services that it normally purchased in the United States in order to maintain, repair, operate, and service the drilling rigs and related equipment in connection with regular drilling operations. The cessation of demand for parts, services, and equipment directly and immediately affected H&P-V's and the third parties' commercial transactions in the United States.

135. When the PDVSA Defendants breached their contractual obligations, H&P-IDC subsidized or loaned money to H&P-V by paying for certain expenses and overhead costs of that entity, thereby reversing the flow of funds (which should have flowed from H&P-V to H&P-IDC), with direct effect on the books and bottom line of the U.S. parent corporations.

136. *Effect on U.S. Business Operations.* When the PDVSA Defendants breached their contractual obligations, H&P was compelled to actively pursue payment from the PDVSA Defendants, including by writing demand letters, developing and proposing

payment plans, and considering settlement possibilities. Those activities were carried out in the United States, at the headquarters of the U.S. parent corporation, and elsewhere in the United States.

137. H&P was compelled to negotiate with the PDVSA Defendants on the telephone from the United States, and in a face-to-face meeting in Houston, Texas. H&P also had to send personnel from the United States to Venezuela to provide accounting and other support in the process of responding to PDVSA's failure to make its contractually obligated payments.

138. *Effects of the Expropriation.* The expropriation of H&P-V's business operations had direct effects on H&P-IDC by causing it to incur substantial costs.

139. Venezuela's expropriation of the rigs deprived H&P-IDC of its ownership and control of H&P-V, and deprived H&P-IDC of its subsidiary and its business as a going concern, directly impacting the operations and bottom line of H&P-IDC.

140. Venezuela's expropriation of the rigs directly impacted U.S.-based management and activities in support of H&P-V, shifting from management and support of a going concern to a collection and negotiation effort.

141. H&P, Inc. was compelled to accept and publicly disclose in the United States material losses.

142. H&P had to change strategy and shift deployment of U.S. personnel to operations in different countries or regions, as a systemic, direct result of Defendants failure to pay tens of millions of U.S. Dollars under the contracts.

143. The expropriation also directly affected third party vendors of H&P-V in the United States who no longer had a role supporting its Venezuelan operations.

H. Defendants' Commercial Activities in the United States

144. The PDVSA Defendants are engaged in significant commercial activity in the United States, defined by the FSIA as "a regular course of commercial conduct or a particular transaction or act." 28 U.SC. § 1605(a)(3). For example, the PDVSA Defendants have entered into long-term contracts with U.S. partners, and engaged in commercial activity specific to the instant case.

145. The United States is currently Venezuela's most important trading partner, with bilateral trade topping 37.4 billion U.S. Dollars in 2009. That same year, Venezuela and PDVSA shipped an average of 1.1 million barrels of crude oil and petroleum products per day to the United States.

146. In addition, Venezuela has imported from the United States billions of U.S. Dollars worth of oil and gas machinery such as drilling rigs, derricks, pumps, and valves, for use by the PDVSA Defendants and other entities.

147. United States companies publicly identify PDVSA as a contractual partner and apparently a customer in the United States. For example, U.S.-based PGI Energy, Inc and BGI Contractors LLC, which formed a joint venture focusing on the fabrication of drilling rigs for its existing contract orders, count PDVSA as a current customer. Similarly, American Piping Products, which is

headquartered in Missouri, recently completed a pipe supply contract with PDVSA.

148. PDVSA's public financial reporting reflects extensive sales the company and its subsidiaries make to customers in the United States. During the nine-month period ending September 30, 2010, PDVSA and its subsidiaries made sales to customers in the United States in excess of 23 billion U.S. Dollars, an increase of more than four billion U.S. Dollars as compared to the same time frame in 2009.

149. PDVSA also engages in extensive commercial activity in the United States with its U.S.-based subsidiary, CITGO, which describes itself as "PDVSA's principal outlet for heavy sour crude oil *in the U.S. market.*" (Emphasis added).

150. Under a contract set to expire January 1, 2012, PDVSA is obligated to supply CITGO a minimum quantity of 10,000 barrels per day of naphtha, which is used primarily as feedstock for producing high octane gasoline.

151. PDVSA also enters into agreements with CITGO for management and administration of the procurement of equipment and other goods and services for PDVSA. PDVSA pays CITGO for these services by offsetting amounts payable under a crude oil supply contract between CITGO and PDVSA.

152. PDVSA also engaged in a loan transaction in the United States when it borrowed one billion U.S. Dollars from CITGO in December 2007. PDVSA still holds the loan and, on information and belief, continues to make periodic payments to CITGO in the United States to maintain that loan.

153. PDVSA also owns a 50-percent stake in Hovensa LLC, a joint venture with the Hess Corporation located on St. Croix, U.S. Virgin Islands. Hovensa is one of the largest oil refineries in the world, with a daily processing capacity of 500,000 barrels per day. Hovensa processes crude oil primarily supplied by PDVSA and distributes it as gas and heating oil in the United States. On information and belief, PDVSA sends tankers carrying crude oil into U.S. territory to supply the Hovensa refinery.

154. PDVSA is also the immediate parent of Bitor America Corporation, a petroleum wholesale distribution company that was incorporated in Delaware in 1989 and has a business address in Boca Raton, Florida.

155. PDVSA owns a 50-percent stake in Chalmette Refining, LLC, a petroleum refinery in Chalmette, Louisiana. Chalmette Refining, LLC has annual sales of $5.6478 billion and employs 600 employees.

156. PDVSA-P is also engaged in commercial activity in the United States. For example, on December 1, 2008, PDVSA-P and CITGO entered into a crude oil supply agreement set to expire March 31, 2012, with automatic renewals for successive 12-month terms unless terminated by either party. Under the contract, CITGO purchases 250,000 barrels of oil per day from PDVSA-P for CITGO's refineries in Lake Charles, Louisiana, and Corpus Christi, Texas, which, on information and belief, PDVSA ships to the United States.

157 These long-term supply contracts, aimed at and intended for the United States market, are

prototypical examples of commercial activity in the United States.

158. The PDVSA Defendants have also engaged in extensive commercial activity in the United States within the context of the instant case. Specifically, on May 24, 2010, the PDVSA Defendants met with H&P personnel at the headquarters of PDVSA's indirect subsidiary, CITGO Petroleum Corporation, in Houston, Texas, to discuss a payment schedule for past debt, as well as possible terms and conditions for H&P-V to re-commence drilling operations. Negotiating a potential commercial contract is itself a commercial activity.

159. Similarly, the PDVSA Defendants engaged in a commercial activity that relates directly to the claims in this case when they agreed to make—and subsequently and repeatedly made—payments in U.S. Dollars to a U.S. bank account in Tulsa, Oklahoma, pursuant to the drilling contracts and related agreements with H&P-V. Even standing alone, these payments constitute commercial activities within the meaning of the FSIA.

I. The Inherent Unfairness and Partiality of Venezuelan Courts

160. The Venezuelan judiciary is politically controlled by the Chávez regime, and it lacks basic due process and impartiality. As a result, and as previously alleged, private parties cannot and do not prevail in litigation against the government, and private companies whose property has been taken are unable to obtain just compensation in Venezuelan courts.

161. The Venezuelan judiciary is politically controlled by President Chávez and the political

party he created in 2007, the United Socialist Party of Venezuela ("PSUV"). President Chávez controls the National Assembly through Chávez loyalists in the PSUV, which won all the seats two elections ago and an overwhelming majority of seats in the last election. President Chávez controls the courts in part by controlling the National Assembly, the majority of which belong to his party and support his regime; the National Assembly, in turn, is empowered to appoint and remove justices on Venezuela's highest court (the "Supreme Tribunal of Justice" or "STJ"). *See* U.S. Department of State, *2010 Human Rights Report: Venezuela* (Apr. 8, 2011).

162. President Chávez also contrived to dominate the STJ by inducing a simple majority of the National Assembly to add nine more Chávez loyalists. *See* U.S. Department of State, *Background Note: Venezuela* (Sept. 2, 2011).

163. The STJ, in turn, controls the lower courts by hearing appeals and also by exercising its authority to hire and fire certain temporary judges "without cause or explanation." *See* U.S. Department of State, *2010 Human Rights Report: Venezuela* (Apr. 8, 2011). As a result, "all courts in the country . . remain[] subject to strong executive control." *Id.*

164. These and other conditions have led to a lack of due process and impartiality in Venezuelan courts. In recent years, the Venezuelan judiciary has been plagued by "corruption, inefficiency, and politicization," as well as "trial delays and violations of due process." *See id.* The "judicial branch's lack of independence and autonomy from the political branches of government [have] made it one of the

weakest pillars in Venezuelan democracy." IACHR, *2010 Annual Report*. In a recent study, Venezuela ranked in the bottom 2.8 percent worldwide in "Rule of Law" indicators, and the bottom 8.1 percent in "Corruption" indicators. *See* World Bank Global Governance Indicator Data (2009).

165. Moreover, conditions in the Venezuelan judiciary have deteriorated since 2007. The U.S. Department of State reports that the "[p]oliticization of the judiciary . . . intensified during [2009]." U.S. Department of State, 2009 Human Rights Report: Venezuela (Mar. 11, 2010). According to the Property Rights Alliance's 2011 Report, Venezuela's "Control of Corruption and Rule of Law" scores both "declined in 2011, with the latter falling to the lowest score *in the world*."

166. As the Venezuelan judiciary has declined, there have been recent increases in both the rate and number of removals of provisional judges, who "can be easily removed when they adopt decisions that could affect government interests." *See* IACHR, *Country Report: Democracy and Human Rights in Venezuela* (Dec. 30, 2009).

167. In February 2011, a delegation of the International Bar Association ("IBA") examined the Venezuelan judiciary and concluded that "the situation of the independence of the judiciary has deteriorated significantly since the last visit of the [IBA] in 2007." *See* Int'l Bar Assoc'n, *Distrust in Justice: The Afiuni Case and the Independence of the Judiciary in Venezuela (Executive Summary)* (April 2011).

168. Under these circumstances, private parties, especially U.S. Companies, now stand no chance of

prevailing in a Venezuelan court against the Chávez government. According to a recent academic study reported by the U.S. Department of State, the court that would have appellate jurisdiction if this matter were litigated in Venezuela "ruled in favor of the government in 324 of the 325 cases brought by private citizens against the government." *See* U.S. Department of State, *2009 Human Rights Report: Venezuela*. On information and belief, the sole case decided in favor of a private party "was later annulled by the Constitutional Chamber of the Supreme Tribunal of Justice, by using a special power that had never before been used in Venezuelan judicial history. Likewise, from October 2009 to October 2010, the Venezuelan high court "rejected 90 percent of judicial cases" against instrumentalities of the government "and all 21 legal actions against President Chávez." *See* U.S. Department of State, *2010 Human Rights Report: Venezuela*.

169. Venezuelan judges who have decided cases against the Chávez government have been reversed and removed. There is a "long list of judges who have been removed after handing down decisions that affected government interests." IACHR, *Country Report: Democracy and Human Rights in Venezuela* (Dec. 30, 2009). Venezuelan judges are "not free to adopt decisions that go against the government's interests; if they do, they run the risk of being removed from the bench, prosecuted and subjected to conditions that violate human dignity." *See* IACHR, *2010 Annual Report* (Mar. 7, 2011); *see also* U.S. Department of State, *2010 Human Rights Report: Venezuela*.

170. For example, three court of criminal appeals judges were removed one day after releasing a number of anti-government demonstrators. *See* IACHR, *2010 Annual Report*. In another recent example, government agents stormed the courtroom of a Venezuelan judge and arrested her within minutes of her issuing a decision that a detainee's rights had been violated by the government. Two days after her arrest, President Chávez publicly called for her imprisonment for 30 years as a lesson to other judges. *Id.* She was subsequently imprisoned and subjected to physical mistreatment. *Id.*

171. Proceedings in the Venezuelan courts cannot result in adequate relief here for the additional reason that, even in the unlikely event the Venezuelan courts award compensation, they could do so only in Venezuelan currency. Payment in a non-convertible currency does not constitute "just compensation" under international law. The Venezuelan currency is non-convertible. Foreign currency exchanges are controlled by the Venezuelan government's Commission for the Administration of Foreign Exchange ("CADIVI"), which "often delays or refuses the applications of private companies, limiting or denying their access to foreign exchange." *See* Bureau of Economic, Energy and Business Affairs, U.S. Department of State, *2010 Investment Climate Statement: Venezuela* (March 2011). Indeed, CADIVI has refused for years to grant H&P-V's pending applications to exchange Bolivars for U.S. Dollars for the purpose of remitting dividends to the United States.

Count I

(Taking in Violation of International Law)

172. Plaintiffs re-allege and repeat the allegations as against all Defendants, as contained in paragraphs 1-171, above.

173. Defendant Venezuela is a foreign sovereign, and a "foreign state" within the meaning of the FSIA.

174. Defendants PDVSA and PDVSA-P are agencies or instrumentalities of Venezuela, and are therefore "foreign states" within the meaning of FSIA.

175. The PDVSA Defendants have extensive commercial activities in the United States, including billions of U.S. Dollars in oil exports to the United States.

176. H&P-IDC is a U.S. company that wholly owns H&P-V. Under Venezuelan law, Plaintiff H&P-V is a "foreign" company, required to register as such, and it is a foreign national, with respect to Venezuela, under international law.

177. Prior to the expropriation, Plaintiffs had full ownership of the business and assets that were confiscated.

178. Today, pursuant to the official acts of Defendant Venezuela, the PDVSA Defendants own and operate the business and assets that were confiscated.

179. Defendants' acts of expropriation are in violation of international law.

180. Defendants' confiscation of Plaintiffs business and assets is discriminatory, based on Plaintiffs' status as foreign (*i.e.*, U.S.) companies vis-

à-vis Venezuela, and/or Plaintiffs' connections to the United States.

181. Defendants' confiscation of Plaintiffs' business and assets was undertaken without prompt, adequate, and effective compensation. More than a year has passed since the unlawful taking and Defendants have failed entirely to provide any adequate forum and process to obtain compensation, much less an actual payment of prompt, adequate, and effective compensation, as required by international law. Venezuelan legal process will never provide prompt, adequate, and effective compensation for the seized business and assets.

Count II

(Breach of Contract)

Count II(A)—Contract No. 4600013176

182. H&P-V re-alleges and repeats the allegations as against the PDVSA Defendants, as contained in paragraphs 1-171 above.

183. The parties entered into a valid contract concerning the operation of H&P's Rig HP-160 in Venezuela, Contract No. 4600013176, as amended by the 61-39 Agreement (collectively, "Contract No. 4600013176").

184. Contract No. 4600013176 provided for drilling services to be performed by H&P-V and paid for by the PDVSA Defendants on a "daywork" contract basis.

185. Contract No. 4600013176 was supported by consideration, and was entered into by individuals with the requisite authority and capacity to do so.

186. Contract No. 4600013176 required the PDVSA Defendants to pay for drilling operations.

187. The PDVSA Defendants failed to make timely and complete payments, as obligated to do so under Contract No. 4600013176. Amounts remain due under Contract No. 4600013176.

188. The breach of Contract No. 4600013176 occurred outside the United States, in Venezuela, and was in connection with commercial activity elsewhere.

189. The breach of Contract No. 4600013176 had direct effects in the United States.

190. Plaintiffs have fully performed any and all obligations under Contract No. 4600013176. In addition to performing the requisite drilling and other services, Plaintiffs complied with those provisions regarding invoicing for work performed.

191. Defendants' failure to timely and completely pay Plaintiffs as required under Contract No. 4600013176 have directly harmed Plaintiffs.

Count II(B)—Contract No. 4600016461

192. H&P-V re-alleges and repeats the allegations as against the PDVSA Defendants, as contained in paragraphs 1-171 above.

193. The parties entered into a valid contract concerning the operation of H&P's Rig HP-135 in Venezuela, Contract No. 4600016461.

194. Contract No. 4600016461 provided for drilling services to be performed by H&P-V and paid for by the PDVSA Defendants on a "daywork" contract basis.

195. Contract No. 4600016461 was supported by consideration, and was entered into by individuals with the requisite authority and capacity to do so.

196. Contract No. 4600016461 required the PDVSA Defendants to pay for drilling operations.

197. The PDVSA Defendants failed to make timely and complete payments, as obligated to do so under Contract No. 4600016461. Amounts remain due under Contract No. 4600016461.

198. The breach of Contract No. 4600016461 occurred outside the United States, in Venezuela, and was in connection with commercial activity elsewhere.

199. The breach of Contract No. 4600016461 had direct effects in the United States.

200. Plaintiffs have fully performed any and all obligations under Contract No. 4600016461. In addition to performing the requisite drilling and other services, Plaintiffs complied with those provisions regarding invoicing for work performed.

201. Defendants' failure to timely and completely pay Plaintiffs as required under Contract No. 4600016461 have directly harmed Plaintiffs.

Count II(C)—Contract No. 4600017135

202. H&P-V re-alleges and repeats the allegations as against the PDVSA Defendants, as contained in paragraphs 1-171, above.

203. The parties entered into a valid contract concerning the operation of H&P's Rig HP-113 in Venezuela, Contract No. 4600017135, as amended by the 61-39 Agreement (collectively, "Contract No. 4600017135").

204. Contract No. 4600017135 provided for drilling services to be performed by H&P-V and paid for by the PDVSA Defendants on a "daywork" contract basis.

205. Contract No. 4600017135 was supported by consideration, and was entered into by individuals with the requisite authority and capacity to do so.

206. Contract No. 4600017135 required the PDVSA Defendants to pay for drilling operations.

207. The PDVSA Defendants failed to make timely and complete payments, as obligated to do so under Contract No. 4600017135. Amounts remain due under Contract No. 4600017135.

208. The breach of Contract No. 4600017135 occurred outside the United States, in Venezuela, and was in connection with commercial activity elsewhere.

209. The breach of Contract No. 4600017135 had direct effects in the United States.

210. Plaintiffs have fully performed any and all obligations under Contract No. 4600017135. In addition to performing the requisite drilling and other services, Plaintiffs complied with those provisions regarding invoicing for work performed.

211. Defendants' failure to timely and completely pay Plaintiffs as required under Contract No. 4600017135 have directly harmed Plaintiffs.

Count II(D)—Contract No. 4600017140

212. H&P-V re-alleges and repeats the allegations as against the PDVSA Defendants, as contained in paragraphs 1-171 above.

213. The parties entered into a valid contract concerning the operation of H&P's Rig HP-115 in Venezuela, Contract No. 4600017140, as amended by the 61-39 Agreement (collectively, "Contract No. 4600017140").

214. Contract No. 4600017140 provided for drilling services to be performed by H&P-V and paid for by the PDVSA Defendants on a "daywork" contract basis.

215. Contract No. 4600017140 was supported by consideration, and was entered into by individuals with the requisite authority and capacity to do so.

216. Contract No. 4600017140 required the PDVSA Defendants to pay for drilling operations.

217. The PDVSA Defendants failed to make timely and complete payments, as obligated to do so under Contract No. 4600017140. Amounts remain due under Contract No. 4600017140.

218. The breach of Contract No. 4600017140 occurred outside the United States, in Venezuela, and was in connection with commercial activity elsewhere.

219. The breach of Contract No. 4600017140 had direct effects in the United States.

220. Plaintiffs have fully performed any and all obligations under Contract No. 4600017140. In addition to performing the requisite drilling and other services, Plaintiffs complied with those provisions regarding invoicing for work performed.

221. Defendants' failure to timely and completely pay Plaintiffs as required under Contract No. 4600017140 have directly harmed Plaintiffs.

Count II(E)—Contract No. 4600017141

222. H&P-V re-alleges and repeats the allegations as against the PDVSA Defendants, as contained in paragraphs 1-171 above.

223. The parties entered into a valid contract concerning the operation of H&P's Rig HP-127 in Venezuela, Contract No. 4600017141, as amended by the 61-39 Agreement (collectively, "Contract No. 4600017141").

224. Contract No. 4600017141 provided for drilling services to be performed by H&P-V and paid for by the PDVSA Defendants on a "daywork" contract basis.

225. Contract No. 4600017141 was supported by consideration, and was entered into by individuals with the requisite authority and capacity to do so.

226. Contract No. 4600017141 required the PDVSA Defendants to pay for drilling operations.

227. The PDVSA Defendants failed to make timely and complete payments, as obligated to do so under Contract No. 4600017141. Amounts remain due under Contract No. 4600017141.

228. The breach of Contract No. 4600017141 occurred outside the United States, in Venezuela, and was in connection with commercial activity elsewhere.

229. The breach of Contract No. 4600017141 had direct effects in the United States.

230. Plaintiffs have fully performed any and all obligations under Contract No. 4600017141. In addition to performing the requisite drilling and other services, Plaintiffs complied with those provisions regarding invoicing for work performed.

231. Defendants' failure to timely and completely pay Plaintiffs as required under Contract No. 4600017141 have directly harmed Plaintiffs.

Count II(F)—Contract No. 4600017142

232. H&P-V re-alleges and repeats the allegations as against the PDVSA Defendants, as contained in paragraphs 1-171 above.

233. The parties entered into a valid contract concerning the operation of H&P's Rig HP-128 in Venezuela, Contract No. 4600017142, as amended by the 61-39 Agreement (collectively, "Contract No. 4600017142").

234. Contract No. 4600017142 provided for drilling services to be performed by H&P-V and paid for by the PDVSA Defendants on a "daywork" contract basis.

235. Contract No. 4600017142 was supported by consideration, and was entered into by individuals with the requisite authority and capacity to do so.

236. Contract No. 4600017142 required the PDVSA Defendants to pay for drilling operations.

237. The PDVSA Defendants failed to make timely and complete payments, as obligated to do so under Contract No. 4600017142. Amounts remain due under Contract No. 4600017142.

238. The breach of Contract No. 4600017142 occurred outside the United States, in Venezuela, and was in connection with commercial activity elsewhere.

239. The breach of Contract No. 4600017142 had direct effects in the United States.

240. Plaintiffs have fully performed any and all obligations under Contract No. 4600017142. In addition to performing the requisite drilling and other services, Plaintiffs complied with those provisions regarding invoicing for work performed.

241. Defendants' failure to timely and completely pay Plaintiffs as required under Contract No. 4600017142 have directly harmed Plaintiffs.

Count II(G)—Contract No. 4600017143

242. H&P-V re-alleges and repeats the allegations as against the PDVSA Defendants, as contained in paragraphs 1-171 above.

243. The parties entered into a valid contract concerning the operation of H&P's Rig HP-129 in Venezuela, Contract No. 4600017143, as amended by the 61-39 Agreement (collectively, "Contract No. 4600017143").

244. Contract No. 4600017143 provided for drilling services to be performed by H&P-V and paid for by the PDVSA Defendants on a "daywork" contract basis.

245. Contract No. 4600017143 was supported by consideration, and was entered into by individuals with the requisite authority and capacity to do so.

246. Contract No. 4600017143 required the PDVSA Defendants to pay for drilling operations.

247. The PDVSA Defendants failed to make timely and complete payments, as obligated to so under Contract No. 4600017143. Amounts remain due under Contract No. 4600017143.

248. The breach of Contract No. 4600017143 occurred outside the United States, in Venezuela, and was in connection with commercial activity elsewhere.

249. The breach of Contract No. 4600017143 had direct effects in the United States.

250. Plaintiffs have fully performed any and all obligations under Contract No. 4600017143. In addition to performing the requisite drilling and other services, Plaintiffs complied with those provisions regarding invoicing for work performed.

251. Defendants' failure to timely and completely pay Plaintiffs as required under Contract No. 4600017143 have directly harmed Plaintiffs.

Count II (H)—Contract No. 4600017145

252. H&P-V re-alleges and repeats the allegations as against the PDVSA Defendants, as contained in paragraphs 1-171 above.

253. The parties entered into a valid contract concerning the operation of H&P's Rig HP-150 in Venezuela, Contract No. 4600017145, as amended by the 61-39 Agreement (collectively, "Contract No. 4600017145").

254. Contract No. 4600017145 provided for drilling services to be performed by H&P-V and paid for by the PDVSA Defendants on a "daywork" contract basis.

255. Contract No. 4600017145 was supported by consideration, and was entered into by individuals with the requisite authority and capacity to do so.

256. Contract No. 4600017145 required the PDVSA Defendants to pay for drilling operations.

257. The PDVSA Defendants failed to make timely and complete payments, as obligated to do so under Contract No. 4600017145. Amounts remain due under Contract No. 4600017145.

258. The breach of Contract No. 4600017145 occurred outside the United States, in Venezuela,

and was in connection with commercial activity elsewhere.

259. The breach of Contract No. 4600017145 had direct effects in the United States.

260. Plaintiffs have fully performed any and all obligations under Contract No. 4600017145. In addition to performing the requisite drilling and other services, Plaintiffs complied with those provisions regarding invoicing for work performed.

261. Defendants' failure to timely and completely pay Plaintiffs as required under Contract No. 4600017145 have directly harmed Plaintiffs.

Count II(I)—Contract No. 4600017146

262. H&P-V re-alleges and repeats the allegations as against the PDVSA Defendants, as contained in paragraphs 1-171 above.

263. The parties entered into a valid contract concerning the operation of H&P's Rig HP-153 in Venezuela, Contract No. 4600017146, as amended by the 61-39 Agreement (collectively, "Contract No. 4600017146").

264. Contract No. 4600017146 provided for drilling services to be performed by H&P-V and paid for by the PDVSA Defendants on a "daywork" contract basis.

265. Contract No. 4600017146 was supported by consideration, and was entered into by individuals with the requisite authority and capacity to do so.

266. Contract No. 4600017146 required the PDVSA Defendants to pay for drilling operations.

267. The PDVSA Defendants failed to make timely and complete payments, as obligated to do so

under Contract No. 4600017146. Amounts remain due under Contract No. 4600017146.

268. The breach of Contract No. 4600017146 occurred outside the United States, in Venezuela, and was in connection with commercial activity elsewhere.

269. The breach of Contract No. 4600017146 had direct effects in the United States.

270. Plaintiffs have fully performed any and all obligations under Contract No. 4600017146. In addition to performing the requisite drilling and other services, Plaintiffs complied with those provisions regarding invoicing for work performed.

271. Defendants' failure to timely and completely pay Plaintiffs as required under Contract No. 4600017146 have directly harmed Plaintiffs.

Count II(J)—Contract No. 4600017147

272. H&P-V re-alleges and repeats the allegations as against the PDVSA Defendants, as contained in paragraphs 1-171 above.

273. The parties entered into a valid contract concerning the operation of H&P's Rig HP-174 in Venezuela, Contract No. 4600017147, as amended by the 61-39 Agreement (collectively, "Contract No. 4600017147").

274. Contract No. 4600017147 provided for drilling services to be performed by H&P-V and paid for by the PDVSA Defendants on a "daywork" contract basis.

275. Contract No. 4600017147 was supported by consideration, and was entered into by individuals with the requisite authority and capacity to do so.

276. Contract No. 4600017147 required the PDVSA Defendants to pay for drilling operations.

277. The PDVSA Defendants failed to make timely and complete payments, as obligated to do so under Contract No. 4600017147. Amounts remain due under Contract No. 4600017147.

278. The breach of Contract No. 4600017147 occurred outside the United States, in Venezuela, and was in connection with commercial activity elsewhere.

279. The breach of Contract No. 4600017147 had direct effects in the United States.

280. Plaintiffs have fully performed any and all obligations under Contract No. 4600017147. In addition to performing the requisite drilling and other services, Plaintiffs complied with those provisions regarding invoicing for work performed.

281. Defendants' failure to timely and completely pay Plaintiffs as required under Contract No. 4600017147 have directly harmed Plaintiffs.

RELIEF REQUESTED

282. WHEREFORE, Plaintiffs request that this Court award a judgment on all Counts and award it such damages and compensation, including interest, attorneys fees, costs and such other relief as this Court may deem just.

Dated: September 23, 2011

Respectfully submitted,

/s/ David W. Ogden
David W. Ogden (D.C. Bar No. 375951)

Elisebeth Collins Cook (D.C. Bar No. 479592)
Francesco Valentini (D.C. Bar No. 986769)
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Avenue, NW
Washington, DC 20006
Tel.: (202) 663-6000
Fax: (202) 663-6363
E-mail: david.ogden@wilmerhale.com
Attorneys for Plaintiffs

District Court's Order (Jan. 11, 2013)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Case No. 1:11-cv-01735

HELMERICH & PAYNE INTERNATIONAL DRILLING CO.,
and HELMERICH & PAYNE DE VENEZUELA, C.A.,
Plaintiffs,

vs.

BOLIVARIAN REPUBLIC OF VENEZUELA,
PETRÓLEOS DE VENEZUELA, S.A.,
and PDVSA PETRÓLEO, S.A.,
Defendants.

Filed: January 11, 2013

[ORDER ON] JOINT STIPULATION AND MOTION TO ESTABLISH A BRIEFING SCHEDULE FOR THE ADJUDICATION OF DEFENDANTS' MOTIONS TO DISMISS

WHEREAS, on September 23, 2011, Helmerich & Payne International Drilling Co. and Helmerich & Payne de Venezuela C.A. (together, "Plaintiffs") filed the complaint against the Bolivarian Republic of Venezuela, Petróleos de Venezuela, S.A., and PDVSA Petróleo, S.A. ("Defendants"), claiming that Defendants committed a taking in violation of international law when Plaintiffs' property was expropriated and that Defendants committed multiple breaches of contract when they failed to pay

for oil drilling services performed by Plaintiffs, Dkt. No. 1;

WHEREAS, on August 31, 2012, Defendants filed motions pursuant to Federal Rules of Civil Procedure 12(b)(1), (2), and (6), arguing that Plaintiffs' claims should be dismissed for lack of standing, lack of subject matter jurisdiction due to Defendants' sovereign immunity, lack of personal jurisdiction, and based on the act of state doctrine, what Defendants contend is a forum selection clause, and the doctrine of *forum non conveniens*, Dkt. Nos. 22-24;

WHEREAS, on October 1, 2012, Plaintiffs propounded preliminary discovery requests for jurisdictional and other discovery in response to arguments in the motions to dismiss that in Plaintiffs' perception challenged the factual bases of the Court's jurisdiction, contested certain jurisdictional facts alleged by Plaintiffs, and relied on testimony and other materials or factual assertions extraneous to the complaint, Dkt. No. 29;

WHEREAS, on October 23, 2012, following discussions and correspondence among the parties regarding preliminary discovery relevant to the adjudication of Defendants' motions to dismiss, Plaintiffs moved to compel certain discovery related to the Declaration of Adriana Padilla Alfonzo, which had been submitted as an exhibit to the PDVSA Defendants' motion to dismiss, Dkt. No 29;

WHEREAS, on November 21, 2012, Defendants opposed Plaintiffs' motion to compel on, *inter alia*, the ground that certain of the arguments in the motions to dismiss can be resolved as a matter of law solely on the basis of the allegations in the complaint

and the documents referenced therein, without the need for discovery, Dkt. No. 32, while also relying on Dr. Padilla's declaration in support of other arguments regarding what Defendants refer to as the forum selection clause, and noting that the parties had agreed to defer certain of the issues raised in the motions to dismiss to a later phase of the litigation;

WHEREFORE, Plaintiffs and Defendants (together, the "parties"), by and through their respective counsel, hereby STIPULATE AND AGREE, subject to the approval of the Court, that:

1. The following issues raised in Defendants' motions to dismiss shall be adjudicated solely on the basis of the Plaintiffs' allegations (including the materials attached as exhibits or referenced in the complaint), assuming the truth of all well-pleaded factual allegations in the complaint, and construing the complaint in the light most favorable to Plaintiffs:

(A) Whether, for purposes of determining whether a "taking in violation of international law" has occurred under the expropriation exception of the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. § 1605(a)(3), Plaintiff Helmerich & Payne de Venezuela C.A. is a national of Venezuela under international law;

(B) Whether Plaintiffs' expropriation claims are barred by the act of state doctrine, including the issue whether this defense may be adjudicated prior to the resolution of Defendants' challenges to the Court's subject matter jurisdiction;

(C) Whether, for purposes of determining the applicability of the commercial activities exception of the FSIA, 28 U.S.C. § 1605(a)(2), Plaintiffs have sufficiently alleged a "direct effect" in the United States within the meaning of that provision; and

(D) Whether Plaintiff Helmerich & Payne International Drilling Co. has standing.

(collectively, the "Initial Issues");

2. The parties stipulate that they shall rely on no factual evidence, apart from the allegations of the complaint and documents referenced therein, and no arguments based upon such evidence, in connection with the resolution of the Initial Issues.

3. The parties stipulate that Plaintiffs shall brief the Initial Issues in their next round of briefing and reserve argument on the additional issues raised in the motions to dismiss (the ownership or operation of the expropriated assets, application and enforceability of what Defendants refer to as a forum selection clause, and *forum non conveniens* (hereafter "Additional Issues")) until a second phase of briefing on the motions to dismiss. The parties stipulate that the Court should resolve the Initial Issues first, and should not rule on the Additional Issues until it has decided those Initial Issues and, if the motions based upon the Initial Issues are denied in whole or in part such that a claim or claims remain, a second phase of briefing has been concluded. Plaintiffs reserve the right to seek discovery related to any factual issues raised by Defendants' motions prior to filing a responsive brief with respect to such Additional Issues.

4. If the Court approves this stipulation, Plaintiffs agree to withdraw without prejudice their October 23, 2012 motion to compel discovery and request for oral argument (currently scheduled for January 14, 2013), and the parties stipulate in that event that the scheduled argument may be canceled;

5. Plaintiffs shall file their opposition to Defendants' motions to dismiss no later than six (6) weeks after entry of an order approving this stipulation, and Defendants shall file their reply four (4) weeks thereafter;

6. Plaintiffs shall file a consolidated opposition brief on the Initial Issues of no more than 60 pages, and Defendant Venezuela and the PDVSA Defendants shall file respective reply briefs of no more than 25 pages each; and

7. This stipulation is made without prejudice to Plaintiffs seeking leave to file an amended complaint. No party waives any right to appeal a decision, nor does any party waive any other rights except as provided by the express terms of this stipulation.

SO ORDERED this 11th day of January, 2013

/s/ Hon. Robert L. Wilkins
Hon. Robert L. Wilkins
United States District Judge

Dated: January 10, 2013

Respectfully submitted,

HOGAN LOVELLS US LLP

By: */s/ William L. Monts III*
William L. Monts III (D.C. Bar No. 428856)
555 Thirteenth Street, NW
Washington, DC 20004-1009
Tel.: (202) 637-5600
Fax: (202) 637-5910
Email: william.monts@hoganlovells.com

-and-

By: */s/ Bruce D Oakley*
Bruce D. Oakley (D.C. Bar No. TX0102)
700 Louisiana Street, Suite 4300
Houston, Texas 77002
Tel. (713) 632-1400
Fax (713) 632-1401
Email: bruce.oakley@hoganlovells.com
Attorneys for Defendant
Bolivarian Republic of Venezuela

CURTIS, MALLET-PREVOST, COLT & MOSLE LLP

By: */s/ Joseph D. Pizzurro*
Joseph D. Pizzurro, Esq. (D.C. Bar No. 468922)
1717 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
Tel.: (202) 452-7373
Fax: (202) 452-7333
Email: jpizzurro@curtis.com

WILLIAM CUTLER PICKERING HALE AND DORR LLP

By: */s/ David W. Ogden*
David W. Oden (D.C. Bar No. 375951)
David W. Bowker (D.C. Bar No. 989309)
Elisebeth Collins Cook (D.C. Bar No. 479592)
Wilmer Cutler Pickering Hale and Dorr LLP
1875 Pennsylvania Avenue, NW
Washington, DC 20006
Tel.: (202) 663-6000
Fax: (202) 663-6363
E-mail: david.ogden@wilmerhale.com
Attorneys for Plaintiffs

Of Counsel:
Robert B. García, Esq. (*pro hac vice*)
George E. Spencer, Esq. (*pro hac vice*)
101 Park Avenue
New York, New York 10178
Tel.: (212) 696-6000
Fax: (212) 697-1559
Email: robert.garcia@curtis.com
gspencer@curtis.com
Attorneys for Defendants Petróleos de Venezuela, S.A. and PDVSA Petróleo, S.A.

District Court's Memorandum Opinion (Sept. 20, 2013)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action
No. 11-cv-1735 (RLW)

HELMERICH & PAYNE INTERNATIONAL DRILLING CO. and HELMERICH & PAYNE DE VENEZUELA, C.A.,

Plaintiffs,

v.

BOLIVARIAN REPUBLIC OF VENEZUELA, PETRÓLEOS DE VENEZUELA, S.A., and PDVSA PETRÓLEO, S.A.,

Defendants.

MEMORANDUM OPINION

I. INTRODUCTION

This case involves a longstanding and apparently formerly productive contractual relationship that has since broken down. Although Defendants filed motions to dismiss, subsequent to the filing of those motions all parties asked, and this Court agreed, to hold those motions in abeyance so as to first answer four questions central to the disposition of the motions. This Memorandum Opinion addresses those four questions, along with a motion filed by Plaintiffs asking the Court to "enforce" the parties' Joint Stipulation regarding the handling of the four questions. As detailed below, the Court's answers to

the questions, and the resolution of Plaintiffs' motion, do not fully resolve the motions to dismiss, and therefore additional briefing will be necessary on the remaining arguments raised in Defendants' motions.

II. FACTUAL SUMMARY

A. Issue Background[1]

Helmerich & Payne International Drilling Co. (H&P-IDC) is a Delaware-incorporated, Tulsa, Oklahoma-based corporation that wholly owns the subsidiary Helmerich & Payne de Venezuela, C.A. (H&P-V) (collectively, Plaintiffs). (Dkt. No. 1, ¶¶ 2, 9). H&P-V "is incorporated in Venezuela," and "had its principal Venezuelan office in Anaco, Venezuela . . ." (*Id.* ¶ 10). Plaintiffs are oil and gas drilling companies. (*Id.* ¶¶ 9-10). H&P-V began providing contract oil and gas drilling services in Venezuela in the 1970s; H&P-IDC had been operating in Venezuela through wholly-owned subsidiaries since 1954. (*See id.* ¶ 16). Venezuela's Superintendent of Foreign Investment, which is part of the country's Finance Ministry, issued H&P-V a Company Qualification Certificate stating the company "is . . . considered a FOREIGN COMPANY at all relevant legal effects." (*Id.* ¶¶ 100, 102) (capitalization in original).

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[1] Unless specifically noted otherwise, this summary is based on facts alleged in Plaintiffs' Complaint, which are presumed true. (*See* Dkt. No. 34, at 3 ("The parties stipulate that they shall rely on no factual evidence, apart from the allegations of the complaint and documents referenced therein, and no arguments based upon such evidence, in connection with the resolution of the Initial Issues.")).

There are three Defendants in this case. One is the Bolivarian Republic of Venezuela (Venezuela), which of course is a country on the northern coast of South America. The other two are entities owned and controlled by Venezuela: Petróleos de Venezuela, S.A. (PDVSA) and PDVSA Petróleo, S.A. (Petróleo). (*See id.* ¶ 2). PDVSA and Petróleo are energy corporations "that by law enjoy a monopoly on Venezuela's oil reserves." (*Id.*). Petróleo, a wholly owned subsidiary of PDVSA, is the exploration and operating arm of PDVSA. (*Id.* ¶ 13). The PDVSA Defendants concede they are agencies or instrumentalities of Venezuela, as that term is defined at 28 U.S.C. § 1603(b). (*See* Dkt. No. 22-1, at 13).

Beginning around 1997, H&P-V provided contract drilling services exclusively to the PDVSA Defendants and other entities owned by Venezuela. (*See* Dkt. No. 1, ¶ 2). H&P-V and Petróleo signed each contract. (*See id.* ¶¶ 30, 32). This work involved, among other things, "the largest, most powerful, and deepest-drilling, land-based drilling rigs available." (*Id.* ¶¶ 21, 26). At issue in this litigation are ten "fixed term" drilling contracts signed in 2007 to be performed by H&P-V on a "day-rate" basis. (*Id.* ¶¶ 30, 33-35). "The agreed-upon daily rates for H&P-V . . were partially set forth in U.S. Dollars and partially in Venezuelan currency ('Bolivars' or 'Bolivar Fuertes')." (*Id.* ¶ 37) (footnote omitted). "H&P-V separately invoiced the amounts due in U.S. Dollars ('Dollar-based invoices') and the amounts due in Venezuelan currency ('Bolivar-based invoices')." (*Id.* ¶ 38).

Of the ten contracts, one related to drilling in the western region of Venezuela, and the rest related to

drilling in the eastern region. (*Id.* ¶¶ 39-40). The former contract required the Dollar-based invoices to be paid "in U.S. Dollars in the United States" under certain conditions. (Dkt. No. 40-3, at 21-22 (§ 18.14)).[2]

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[2] Specifically, the western drilling contract provides at § 18.14 that:

> "If as a result of the exchange control measures established by the competent authorities, [H&P-V] is unable to obtain in a timely fashion the foreign currency required to perform its obligations abroad related to the performance of this CONTRACT, [Petróleo] agrees to pay in United States dollars the portion of the price of this CONTRACT set in said currency, in accordance with current regulation, "Norms and Procedures for the Payment of Foreign Exchange for Construction, Goods and Services in the Western Division," for those items directly associated with the external component pursuant to the results of the corresponding audit. [H&P-V] shall indicate, for purposes of payment, the bank and account number where payments are to be made. [H&P-V] agrees:
>
> a) That the deposits made by [Petróleo] in the referenced accounts will release [Petróleo] from its obligation to pay the portion of the price set in United States Dollars to the extent of the deposits made.
>
> b) That it will not request from the commercial bank or other foreign exchange operators the acquisition of foreign currency corresponding to the amounts deposited by [Petróleo] in the aforementioned account; and that if it should do so, it will immediately return to [Petróleo], in dollars, the amounts that it would have deposited.
>
> c) That the payment in U.S. dollars, as set forth in this section, is of a temporary nature and, consequently, [Petróleo] may pay the portion of the price established in US dollars in Bolivars, at the exchange rate in effect at the place and time of payment, when, in [Petróleo]'s judgment, the grounds that gave rise to this form of

The remaining nine contracts "were supplemented" by a 2008 agreement signed by H&P-V and PDVSA, (Dkt. No. 1, In 40-41), that required the PDVSA Defendants to pay "invoices issued [by H&P-V] corresponding to the contract's foreign currency component . . . in actual dollars at 61% . . abroad in the [Tulsa, Oklahoma] account specified by [H&P-V]," while "the remaining portion, 39%, shall be paid in equivalent bolivars at the official exchange rate," (Dkt. No. 40-7, at 2 (¶¶ 1-2). "This 2008 agreement reiterated the terms of an earlier 2003 agreement, which similarly provided for a set percentage of the PSVSA Defendants' payments to be remitted in U.S. Dollars to a bank account in the United States." (Dkt. No. 1, ¶ 118). "Thus, under each of the contracts at issue, the PDVSA Defendants were required to make payments to H&P-V in U.S. Dollars directly to H&P-V's designated bank account at the Bank of Oklahoma in Tulsa, Oklahoma." (*Id.* ¶ 43).

Around 2007,[3] the PDVSA Defendants "began systematically to breach those contracts" in an amount that eventually amounted to over $32 million in unpaid invoices. (*See id.* ¶¶ 6, 56). In January 2009, H&P, Inc., the parent company of H&P-IDC, (*id.* ¶ 9), "announced it would 'cease[] operations on rigs as their drilling contracts expire'

> temporary payment have ceased. In no case shall [Petróleo] recognize expenses for commissions and/or transfers that [H&P-V] may incur for purchasing foreign exchange."

[3] The Complaint states both that "[s]tarting in 2007" the PDVSA Defendants "fell substantially behind in their payments to H&P-V," (Dkt. No. 1, ¶ 46), and that they "began" to breach the contracts at issue "in late 2008 and 2009," (*id.* ¶ 6).

and not renew its subsidiary's contracts with the PDVSA Defendants absent an 'improvement in receivable collections,' (*id.* ¶ 50). By November 2009, H&P-V had finished its contractually-obligated work and disassembled its equipment. (*See id.* ¶ 53). In 2010, the PDVSA Defendants stopped making payments altogether. (*Id.* ¶¶ 44, 56). Prior to that, they "made at least 55 payments totaling roughly $65 million into H&P-V's designated bank account in Tulsa," in addition to payments made in Bolivars. (*See id.* ¶ 44). The PDVSA Defendants and Plaintiffs met in Houston on May 24, 2010, in an attempt to work out a solution, but were unsuccessful. (*See id.* ¶ 55).

Between June 12 and 14, 2010, the PDVSA Defendants, with assistance from the Venezuelan National Guard, "surrounded and unlawfully blockaded" H&P-V's business premises in western and eastern Venezuela. (*Id.* ¶ 3). "PDVSA's Director of Services expressly informed H&P-V's Administrative Manager that Defendants intended the blockade to prevent H&P-V from removing its rigs and other assets from its premises, and to force H&P-V to negotiate new contract terms immediately." (*Id.* ¶ 63). On June 23, 2010, PDVSA issued a press release stating they had nationalized eleven drilling rigs belonging to "Helmerich & Payne (HP), a U.S. transnational firm." (*Id.* ¶ 65). Two days later, PDVSA issued another press release, which referred to "[t]he nationalization of the oil production drilling rigs from the American contractor H&P . . . " (*Id.* ¶ 66).

On June 29, 2010, the Venezuelan National Assembly issued a Bill of Agreement declaring H&P-V's property to be of public interest, and

recommended to then President Hugo Chávez that he issue a Decree of Expropriation. (*Id.* ¶¶ 3-4). That day, President Chávez issued Presidential Decree No. 7532, directing PDVSA "or its designee affiliate" to seize H&P-V's property. (*See id.* ¶ 4). Also on that same day, the PDVSA Defendants hired a notary to "conduct a judicial inspection of the rigs and other assets" in the eastern (but not western) region of Venezuela. (*Id.* ¶ 71). "H&P-V hired a notary to accompany the PDVSA Defendants' notary; H&P-V's notary simultaneously performed a rushed and incomplete inspection in the limited time available that day." (*Id.*). The property encompasses more than just the drilling rigs, including, for example, real property, vehicles, and various equipment. (*See id.* ¶¶ 77-80). At some time after that, Minister Ramírez, Venezuela's Minister of Energy and Petroleum and also President of PDVSA, spoke in eastern Venezuela at what had been H&P-V's premises there about the seizure, referring to H&P-V as an "American company" with "foreign gentlemen investors" that would now "become part of the payroll" of PDVSA. (*Id.* ¶ 5). On July 1, 2010, Petróleo filed two eminent domain proceedings in Venezuela, one in the eastern region and one in the western. (*Id.* ¶¶ 72-73). In the former, as of September 2011, "H&P-V still has not been afforded the opportunity to appear," and in the latter "those proceedings have not progressed past the earliest stage of the case." (*Id.*). Plaintiffs have received no compensation from Venezuela with respect to the seizure of their drilling rigs and related items. (*Id.* ¶ 86).

B. Procedural Background

Plaintiffs filed their Complaint in September 2011 against Defendants under two provisions of the Foreign Sovereign Immunities Act (FSIA): the commercial activities exception[4] and the expropriation exception.[5] (*Id.* ¶ 1). The Complaint states two counts:

> Taking in Violation of International Law, and Breach of Contract. In three briefs filed separately on August 31, 2012—two by Venezuela, and one by the PDVSA entities—Defendants moved to dismiss. (Dkt. Nos. 22-24). Before opposing the motions to dismiss, Plaintiffs filed a motion to compel discovery, (Dkt. No. 29), which was fully briefed but ultimately

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[4] 28 U.S.C. § 1605(a)(2) ("A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.").

[5] 28 U.S.C. § 1605(a)(3) ("A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States.").

denied without prejudice because the parties instead agreed to a Joint Stipulation, (*see* Dkt. No. 36).

The Joint Stipulation lists four issues raised in the motions to dismiss, termed the "Initial Issues," that the parties "shall brief . . . in their next round of briefing and reserve argument on the additional issues raised in the motions to dismiss . . . ." (Dkt. No. 36, at 3). The four Initial Issues are:

> (A) Whether, for purposes of determining whether a 'taking in violation of international law' has occurred under the expropriation exception of the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. § 1605(a)(3), Plaintiff Helmerich & Payne de Venezuela C.A. is a national of Venezuela under international law;
>
> (B) Whether Plaintiffs' expropriation claims are barred by the act of state doctrine, including the issue whether this defense may be adjudicated prior to the resolution of Defendants' challenges to the Court's subject matter jurisdiction;
>
> (C) Whether, for purposes of determining the applicability of the commercial activities exception of the FSIA, 28 U.S.C. § 1605(a)(2), Plaintiffs have sufficiently alleged a 'direct effect' in the United States within the meaning of that provision; and
>
> (D) Whether Plaintiff Helmerich & Payne International Drilling Co. has standing.

(*Id.* at 3). The Joint Stipulation states that these four issues "shall be adjudicated solely on the basis of the Plaintiffs' allegations (including the materials

attached as exhibits or referenced in the complaint), assuming the truth of all well-pleaded factual allegations in the complaint, and construing the complaint in the light most favorable to Plaintiffs." (*Id.* at 2-3). It also states the following: "The parties stipulate that Plaintiffs shall brief the Initial Issues in their next round of briefing and reserve argument on the additional issues raised in the motions to dismiss (the ownership or operation of the expropriated assets, application and enforceability of what Defendants refer to as a forum selection clause, and *forum non conveniens* (hereafter 'Additional Issues')) until a second phase of briefing on the motions to dismiss." (*Id.* at 3).

Following the agreement on the Joint Stipulation, the parties completed the briefing on the motions to dismiss. Shortly thereafter, Plaintiffs filed a motion to enforce the Joint Stipulation, claiming that the PDVSA Defendants violated the Joint Stipulation by arguing "that the Court cannot exercise personal jurisdiction over the PDVSA Defendants consistent with constitutional due process," which Plaintiffs state is not among the four Initial Issues. (*See* Dkt. No. 45, at 3). Plaintiffs ask that portions of the PDVSA Defendants' Reply that "contain the constitutional due process argument" be stricken. (*See id.* at 5-6). In their Opposition to the motion to enforce, the PDVSA Defendants argue that "a due process analysis is directly related to a determination of direct effect because the FSIA's commercial activity exception cannot grant personal jurisdiction where the Constitution forbids it." (Dkt. No. 46, at 9).

III. ANALYSIS OF INITIAL ISSUES

The Court will address the four Initial Issues in the order they appear in the parties' Joint Stipulation. In addition, as part of answering the question regarding whether the Plaintiffs have sufficiently alleged a direct effect under the relevant FSIA provision, the Court will resolve Plaintiffs' motion to enforce.

A. Corporate Nationality of H&P-V

Listed first among the four Initial Issues is the question of whether H&P-V is considered a national of Venezuela under international law for the purpose of determining if a taking in violation of international law occurred under the expropriation exception of the FSIA. Based on the weight of authority reviewed below, this Court concludes that H&P-V is considered a national of Venezuela under international law.

1. Standard of Review

International law is based on, among other sources, international conventions, principles of law recognized by civilized nations, judicial opinions, and reputable scholarship. *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 36-37 n.23 (D.C. Cir. 2011) (citations omitted). *See also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW (the RESTATEMENT) § 103(2) (1987) ("In determining whether a rule has become international law, substantial weight is accorded to (a) judgments and opinions of international judicial and arbitral tribunals; (b) judgments and opinions of national judicial tribunals; (c) the writings of scholars; [and] (d) pronouncements by states that undertake to state a rule of international law, when such pronouncements are not seriously challenged by

other states."). In the absence of an applicable treaty or controlling federal precedent, "resort must be had to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators who by years of labor, research, and experience have made themselves peculiarly well acquainted with the subjects of which they treat." *The Paquete Habana*, 175 U.S. 677, 700 (1900).

2. Analysis of Relevant Authority

Because no treaty controls the determination of H&P-V's nationality, the Court must examine the sources referenced by the RESTATEMENT § 103(2) to identify statements by authorities on international law in this area. A review of key sources from both the international and national arenas, and an analysis of their application to this case, follows.

a. International Sources

For several decades, the general practice in international law has been to consider a corporation a national of the country of its incorporation. This stems in no small part from the decision of the International Court of Justice (ICJ) in *Case Concerning the Barcelona Traction, Light and Power Co. (Belg. v. Spain)* 1970 I.C.J. 3 (Feb. 5) (*Barcelona Traction*). In *Barcelona Traction*, the ICJ stated that "[t]he traditional rule attributes the right of diplomatic protection of a corporate entity to the State under the laws of which it is incorporated and in whose territory it has its registered office. These two criteria have been confirmed by long practice and by numerous international instruments." *Id.* ¶ 70. The case also later refers to "the general rule that the right of diplomatic protection of a company belongs to its national State . . " *Id.* ¶ 93. The case

has been and remains "widely viewed not only as an accurate statement of the law on diplomatic protection of corporations but a true reflection of customary international law." *See* U.N. Int'l L. Comm'n, Fourth Report on Diplomatic Protection, U.N. Doc. A/CN.4/530, at 11 (Mar. 13, 2003), *available at* http://untreaty.un.org/ilc/documentation/english/a_cn4_530.pdf.

The ICJ recently revisited *Barcelona Traction* and substantially affirmed its earlier decision. *See Case Concerning Ahmadou Sadio Diallo* (*Republic of Guinea v. Democratic Republic of the Congo*) 2007 I.C.J. 582 (May 24) (*Diallo*). In *Diallo*, the ICJ stated that since *Barcelona Traction* "the Court has not had occasion to rule on whether, in international law, there is indeed an exception to the general rule that the right of diplomatic protection of a company belongs to its national State, which allows for protection of the shareholders by their own national State by substitution, and on the reach of any such exception." *Id.* ¶ 87 (quotation marks and citations to *Barcelona Traction* omitted). Given the opportunity to create such an exception, the ICJ in *Diallo*, after "having carefully examined State practice and decisions of international courts and tribunals," declined to do so, finding that the universe of sources examined did not reveal, "at least at the present time," such an exception. *See id.* ¶ 89.

In *Diallo*, the ICJ also stated it was "bound to note that, in contemporary international law, the protection of the rights of companies and the rights of their shareholders, and the settlement of the associated disputes, are essentially governed by bilateral or multilateral agreements for the protection of foreign investments, such as the

International Centre for Settlement of Investment Disputes (ICSID) . . ." *Id.* ¶ 88. A recent pronouncement from the ICSID on corporate nationality, then, is instructive. In *Tokios Tokelès v. Ukraine*, the ICSID issued a Decision on Jurisdiction. Case No. ARB/02/18 (Apr. 29, 2004).[6] That decision states that "reference to the state of incorporation is the most common method of defining the nationality of business entities under modern [Bilateral Investment Treaties] and traditional international law." *Id.* ¶ 63 (citing Christoph H. Schreuer, *The ICSID Convention: A Commentary*, at 277 (2001)). The ICSID approvingly cites to *Barcelona Traction*, calling it "the predominant approach in international law." *Id.* ¶ 70. And the ICSID also cites to a treatise that similarly notes that "it is usual to attribute a corporation to the state under the laws of which it has been incorporated and to which it owes its legal existence; to this initial condition is often added the need for the corporation's head office, registered office, or its *siege social* to be in the same state." 1 OPPENHEIM'S INTERNATIONAL LAW 859-60 (Sir Robert Jennings and Sir Arthur Watts eds., 9th ed. 1996) (footnote omitted).

Given that H&P-V was incorporated in Venezuela and had multiple offices there, including its principal office in Anaco, a review of relevant international sources indicates that the company is to be considered a national of Venezuela. With that in

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[6] The decision is available at the following cumbersome url: https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC639_En&caseId=C220.

mind, the Court now turns to national sources to confirm this understanding.

b. National Sources

The RESTATEMENT is published by the American Law Institute, an organization that includes "judges, legal academicians, and lawyers in independent private practice, in government, and in law departments of business and other enterprises." *See* RESTATEMENT at XI. The most recent version of the RESTATEMENT takes a clear position on corporate nationality in international law: "For purposes of international law, a corporation has the nationality of the state under the laws of which the corporation is organized." *Id.* § 213. The comments to § 213 support this clear statement, noting that "[t]he traditional rule stated in this section, adopted for certainty and convenience, treats every corporation as a national of the state under the laws of which it was created." *Id. cmt.* c. *See also id. cmt.* d. ("[A] corporation has the nationality of the state that created it . . . ."). The RESTATEMENT cites approvingly to *Barcelona Traction*, noting that the case "gave preference to the state of incorporation over a state with other significant links, in representing a company against a third state." *Id.* Reporters' Notes No. 3. It also rejects the suggestion that the place of the *siege social* can be an alternative basis for corporate nationality under international law, instead finding that "[i]n practical effect it is an additional requirement, since jurisdictions using that standard require that a firm be incorporated in the state where it has its *siege*." *Id. cmt.* c.

The Supreme Court has cited to § 213 of the RESTATEMENT, and the parties dispute the significance of that citation to this case. *See JPMorgan Chase Bank v. Traffic Stream (BVI) Infrastructure Ltd.*, 536 U.S. 88, 91-92 (2002). Had the Supreme Court clearly held in *JPMorgan* that the state of incorporation is the definitive test of nationality, that would of course be the end of the analysis. But that was not the case. Nonetheless, because the case is important and neither Plaintiffs nor Defendants squarely address its significance to these facts, a brief word on the case is warranted.

Defendants slightly overstate the import of *JPMorgan*. According to the PDVSA Defendants, "[t]he Supreme Court has held that '[f]or purposes of international law, a corporation has the nationality of the state under the laws of which the corporation is organized.'" (Dkt. No. 22-1, at 22-23) (quoting *JPMorgan*, 536 U.S. at 91-92 (in turn quoting the RESTATEMENT § 213)). Similarly, Venezuela claims that in *JPMorgan* the Supreme Court "has held" that "a corporation has the nationality of the state under the laws of which the corporation is organized." (Dkt. No. 44, at 10) (citation omitted). But there are several indications that what Defendants claim is a holding of the Supreme Court is not actually so. One is that the quote from the RESTATEMENT was used as a parenthetical following a "*Cf.*" cite, and the quote is never discussed or analyzed. Another is that *JPMorgan* is not a case applying international law—hence, the "*Cf.*" cite—but was rather constructing a rule for corporate nationality under domestic law. *See* 536 U.S. at 98-99 ("[O]ur jurisdictional concern here is with the meaning of 'citizen' and 'subject' as those terms are used in [28 U.S.C.] § 1332(a)(2).")

(brackets and internal citation omitted). Thus, there is no clear holding from the Supreme Court in *JPMorgan* on the issue of corporate nationality under international law or the FSIA.

But that does not mean that Plaintiffs are correct when they state *JPMorgan* "has no bearing whatsoever on international law governing expropriations." (Dkt. No. 39, at 38 n.22).[7] As our Court of Appeals has explained, "[C]arefully considered language of the Supreme Court, even if technically dictum, generally must be treated as authoritative." *United States v. Oakar*, 111 F.3d 146, 153 (D.C. Cir. 1997) (citation omitted). Perhaps the Supreme Court's passing citation to the RESTATEMENT fails to meet this standard, nonetheless the Court's imprimatur of this RESTATEMENT provision carries considerable force.

Other United States courts, in line with the RESTATEMENT, have concluded that a corporation's nationality is determined by its state of incorporation. For example, in *Rong v. Liaoning Provincial Government*, 362 F. Supp. 2d 83 (D.D.C. 2005), *aff'd on other grounds*, 452 F.3d 883 (D.C. Cir. 2006), Broadsino, an entity incorporated in Hong Kong, claimed that its property was expropriated by China. Plaintiffs in *Rong* argued that Broadsino should not be determined to be a national of China based in part on the fact that there had previously been an agreement that Hong Kong corporations would be considered foreign nationals with respect to

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[7] Plaintiffs' Opposition appears to only address *JPMorgan* in this footnote. According to their Table of Authorities, the case appears once on page 30, (Dkt. No. 39, at 5), but the Court sees no mention of the case there.

China. *See* 362 F. Supp. 2d at 101. Judge Walton rejected this argument and looked to the state of incorporation to determine nationality. "[B]ecause Broadsino is a corporation organized under the laws of Hong Kong, [China]'s actions did not contravene international law. . . [E]xpropriation by a sovereign state of the property of its own national does not implicate settled principles of international law." *Id.* at 101-02. And recently in *Best Medical Belgium, Inc. v. Kingdom of Belgium*, 913 F. Supp. 2d 230 (E.D. Va. 2012), an American company with "a controlling share" of a Belgian subsidiary challenged an alleged expropriation by the Belgian government. *Id.* at 234. The court in that case found no violation of international law, holding that the subsidiary was a Belgian national. *Id.* at 239-40.

On the other side of the ledger, so to speak, from the ICJ, ICSID, RESTATEMENT, U.S. Supreme Court, and other courts, Plaintiffs point to one case from the Second Circuit—Banco *Nacional de Cuba v. Sabbatino*, 307 F.2d 845 (2d Cir. 1962) (*Sabbatino*), *rev'd on other grounds*, 376 U.S. 398 (1964); *see also Banco Nacional de Cuba v. Farr*, 383 F.2d 166, 168 (2d Cir. 1967) (a continuing part of the "much-discussed previous [*Sabbatino*] opinions"). There is no doubt *Sabbatino* is a useful case for Plaintiffs. In that case, the Second Circuit disregarded the nationality of the corporation where it was different from the nationality of most of the corporation's shareholders. 307 F.2d at 861. The court stated that "[w]hen a foreign state treats a corporation in a particular way because of the nationality of its shareholders, it would be inconsistent for us in passing on the validity of that treatment to look only to the 'nationality' of the corporate fiction." *Id.*

Plaintiffs claim that *Sabbatino* is a "seminal" case. (Dkt. No. 39, at 33). However, if the case were truly seminal, it would have strongly influenced later developments, yet it appears that *Sabbatino's* proposition that a corporation's state of incorporation can be ignored has never been followed by any court in the United States. Plaintiffs point to none, and this Court has found none.

3. Conclusion

Although Plaintiffs are not without any support in arguing that H&P-V is not a national of Venezuela under international law, the holding of the Second Circuit in *Sabbatino* is overwhelmed by authorities including cases from the International Court of Justice, a Decision on Jurisdiction from the International Center for the Settlement of Investment Disputes, other decisions from U.S. courts, and treatises (including one endorsed by the Supreme Court). The weight of authority therefore leads to the conclusion that H&P-V is considered a national of Venezuela under international law.

B. Act of State doctrine

The second of the parties' Initial Issues is whether the act of state doctrine bars Plaintiffs' expropriation claims. As part of that inquiry, the Court must determine "whether this defense may be adjudicated prior to the resolution of Defendants' challenges to the Court's subject matter jurisdiction." (Dkt. No. 36, at 3). Because this Court must first determine it has jurisdiction before considering an act of state defense, the time is not yet ripe for resolving whether the act of state doctrine bars Plaintiffs' expropriation claims.

1. Background on the act of state doctrine

The act of state doctrine "precludes the courts of this country from inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964). This doctrine "is applicable when 'the relief sought or the defense interposed would require a court in the United States to declare invalid the official act of a foreign sovereign performed within' its boundaries." *World Wide Minerals, Ltd. v. Republic of Kazakhstan*, 296 F.3d 1154, 1164 (D.C. Cir. 2002) (internal brackets omitted) (quoting *W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp.*, 493 U.S. 400, 405 (1990)). The doctrine is to be interpreted and applied in accordance with the policy interests of "international comity, respect for the sovereignty of other nations on their own territory, and the avoidance of embarrassment to the Executive Branch in its conduct of foreign relations." *W.S. Kirkpatrick*, 493 U.S. at 408; *Nemariam v. Fed. Democratic Republic of Ethiopia*, 491 F.3d 470, 477 n.7 (D.C. Cir. 2007). However, the party raising the defense bears the burden to affirmatively show that an act of state has occurred and "that no bar to the doctrine is applicable under the factual circumstances." *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1534 (D.C. Cir. 1984) (en banc), *judgment vacated on other grounds*, 471 U.S. 1113 (1985).

The Second Hickenlooper Amendment is an exception to the act of state doctrine. *See* 22 U.S.C. § 2370(e)(2). Through this Amendment, Congress legislatively overruled *Sabbatino* so that the act of

state doctrine would not preclude adjudication of an expropriation claim where the court has jurisdiction to hear it. *See Nemariam*, 491 F.3d at 477 n.8 ("Through the Hickenlooper Amendment, 'Congress . . . adopted a specific statutory provision requiring federal courts to examine the merits of controversies involving expropriation claims. [It] overrides the judicially developed doctrine of act of state.') (quoting *West v. Multibanco Comermex, S.A.*, 807 F.2d 820, 829 (9th Cir. 1987)). Specifically, the Amendment bars application of the doctrine where there is: "[(1)] a claim of title or other right to property asserted by any party including a foreign state (or a party claiming through such state); [(2)] based upon (or traced through) a confiscation or other taking after January 1, 1959; [(3)] by an act of state in violation of the principles of international law . . ." 22 U.S.C. § 2370(e)(2).

2. Jurisdictional considerations

"Federal courts are courts of limited jurisdiction." *Gunn v. Minton*, 133 S. Ct. 1059, 1064 (2013) (citation omitted). Jurisdiction is "the first and fundamental question" federal courts must ask when overseeing any case. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998). Thus, there is a threshold duty vested in every court to resolve jurisdictional disputes prior to any ruling on the merits. *See Galvan v. Fed. Prison Indus., Inc.*, 199 F.3d 461, 463 (D.C. Cir. 1999).

Because "there is no unyielding jurisdictional hierarchy," *Ruhrgas A.G. v. Marathon Oil Co.*, 526 U.S. 574, 578 (1999), district courts have the discretion to resequence jurisdictional questions, *United States v. Johnson*, 254 F.3d 279, 287 n.11

(D.C. Cir. 2001); *see also Galvan*, 199 F.3d at 463 (resolving a sovereign immunity challenge before subject-matter jurisdiction, holding "[s]overeign immunity questions clearly belong among the non-merits decisions that courts may address even where subject-matter jurisdiction is uncertain [because] the Supreme Court has characterized the defense as jurisdictional") (citing *FDIC v. Meyer*, 510 U.S. 471, 475 (1994)); *cf. Ruhrgas AG*, 526 U.S. at 586 (expressly allowing adjudication of challenges to personal jurisdiction prior to subject-matter jurisdiction where "concerns of judicial economy and restraint are overriding").

In short, district courts cannot resolve a merits defense prior to resolving a challenge to subject-matter jurisdiction. *See Steel Co.*, 523 U.S. at 94.

3. Application of jurisdictional considerations to the act of state doctrine

The act of state doctrine goes to the merits, and is not a jurisdictional defense. *See Republic of Austria v. Altmann*, 541 U.S. 677, 700 (2004) ("Unlike a claim of sovereign immunity, which merely raises a jurisdictional defense, the act of state doctrine provides foreign states with a substantive defense on the merits."). This Circuit has repeatedly recognized the act of state doctrine as a merits defense requiring prior resolution of jurisdictional questions. *See, e.g.*, *World Wide Minerals, Ltd. v. Republic of Kazakhstan*, 296 F.3d 1154, 1161 (D.C. Cir. 2002) ("[J]urisdiction must be resolved before applying the act of state doctrine, because that doctrine is 'a substantive rule of law.") (quoting *In re Papandreou*, 139 F.3d 247, 256 (D.C. Cir. 1998)) (footnote

omitted); *Marra v. Papandreou*, 216 F.3d 1119, 1122 (D.C. Cir. 2000) (reaffirming *In re Papandreou's* holding that while standing, personal jurisdiction, and forum non conveniens are jurisdictional issues, the act of state doctrine is not); *In re Papandreou*, 139 F.3d at 256 ("[W]e note that the Supreme Court has authoritatively classified the act of state doctrine as a substantive rule of law. Accordingly, resolution of the case on this ground, before addressing the FSIA jurisdictional issue, would exceed the district court's power.") (citations omitted). This Circuit's sequencing rule requires consideration of whether subject-matter jurisdiction exists under the FSIA before deciding whether to dismiss the case under the act of state doctrine. Therefore the determination of whether the act of state doctrine applies to the facts of this case must wait.

C. The Direct Effect test

The third of the Initial Issues is "[w]hether, for purposes of determining the applicability of the commercial activities exception of the FSIA, 28 U.S.C. § 1605(a)(2), Plaintiffs have sufficiently alleged a 'direct effect' in the United States within the meaning of that provision." (*See* Dkt. No. 36 ¶ 1). The Circuits are divided on how direct a "direct effect" must be since the Supreme Court's only case interpreting the relevant FSIA language. *See Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992). But based on a review of the developments in this area, particularly in this Circuit, Plaintiffs have sufficiently stated a direct effect under the FSIA's commercial activities exception.

1. Standard of Review

As the Supreme Court has explained, "the FSIA [is] the sole basis for obtaining jurisdiction over a foreign state in our courts." *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989). The Act provides that foreign states are immune from the jurisdiction of both federal and state courts, subject to those specific exceptions embedded within the statute providing otherwise. *See* 28 U.S.C. §§ 1604-07. In a suit brought against a foreign state, a district court must decide, as a threshold question, whether any of the FSIA exceptions apply. *See Verlinden B. V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 493-94 (1983).

Section 1605(a)(2) of the FSIA describes an exception to the presumption of foreign sovereign immunity where "the action is based upon . . . an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." 28 U.S.C. § 1605(a)(2). Therefore, the parties' Joint Stipulation, requesting that the Court decide whether Plaintiffs have sufficiently alleged a direct effect in the United States, operates as an incremental and narrowly-tailored facial challenge to the Court's jurisdiction. Federal jurisdictional pleading standards apply accordingly. *See* FED R. CIV. P. 12(b)(1).

The same standards that apply to a Rule 12(b)(6) motion to dismiss apply where the defendant raises a facial challenge to the court's jurisdiction on the pleadings. *See Muscogee Nation v. Okla. Tax Comm'n*, 611 F.3d 1222, 1227 n.1 (10th Cir. 2010) (construing defendants' challenge to jurisdiction as

facial and therefore "apply[ing] the same standards under Rule 12(b)(1) that are applicable to a Rule 12(b)(6) motion to dismiss for failure to state a cause of action."); *Kerns v. United States*, 585 F.3d 187, 192 (4th Cir. 2009) ("When a defendant makes a facial challenge to subject matter jurisdiction, the plaintiff, in effect, is afforded the same procedural protections as he would receive under a Rule 12(b)(6) consideration."); *Ballentine v. United States*, 486 F.3d 806, 810 (3d Cir. 2007) ("Pursuant to Rule 12(b)(1), the Court must accept as true all material allegations set forth in the complaint, and must construe those facts in favor of the nonmoving party.").

Applying a Rule 12(b)(6) level of review means "[a] complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). *Iqbal*'s plausibility determination is a "context-specific task" requiring a level of factual explication commensurate with the nature of the claim. *Id.* at 679. Rule 12(b)(1) motions in particular require "the plaintiff [to] assert facts that affirmatively and plausibly suggest that the pleader has the right he claims (here, the right to jurisdiction), rather than facts that are merely consistent with such a right.' *In re Schering Plough Corp. Intron/Temodar Consumer Class Action*, 678 F.3d 235, 244 (3d Cir. 2012) (quoting *Stalley v. Catholic Health Initiatives*, 509 F.3d 517, 521 (8th Cir. 2007)).

For an effect to be "direct" under the FSIA's commercial activities exception, Plaintiffs must adequately allege that the effect "follows as an

immediate consequence of the defendant's activity." *See Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 618 (1992) (citation, internal quotations, and ellipses omitted); *see also Princz v. Fed. Republic of Germany*, 26 F.3d 1166, 1172 (D.C. Cir. 1994). While jurisdiction may not be predicated on "purely trivial effects," the effect need not be substantial or foreseeable. *See Weltover*, 504 U.S. at 618; *Cruise Connections Charter Mgmt. 1, LP v. Attorney Gen. of Canada*, 600 F.3d 661, 664 (D.C. Cir. 2010) (citing *Princz*, 26 F.3d at 1172).

If Plaintiffs have alleged facts sufficient to fairly infer that Defendants "promised [and failed] to perform specific obligations in the United States," then the "direct effect" requirement is satisfied. *See de Csepel v. Republic of Hungary*, 714 F.3d 591, 600-01 (D.C. Cir. 2013) (citing *Weltover*, 504 U.S. at 619). Plaintiffs have alleged Defendants breached nine contracts concerning drilling in the eastern region of Venezuela, and one contract concerning drilling in western region, pursuant to which the PDVSA Defendants agreed to pay a portion of the contracts in U.S. Dollars. (*See* Dkt. No. 1 ¶ 118). Each of the ten contracts contained a provision related to whether and under what conditions payments made in U.S. Dollars would be sent to the Bank of Oklahoma in Tulsa, Oklahoma. (*See id.* ¶ 43).

A foreign state promising to perform specific obligations in the United States, and then breaking that promise, has a "direct effect" in the United States under FSIA, without regard to how important the place of that performance was to the parties or the agreement. *See de Csepel*, 714 F.3d at 600-01; *see also I.T. Consultants, Inc. v. Islamic Republic of*

Pakistan, 351 F.3d 1184, 1186 (D.C. Cir. 2003) ("[A] foreign sovereign's failure to make a contractually required deposit in a bank in the United States meets the statute's definition of a 'direct effect,' without regard to whether the parties considered the place of payment 'important,' 'critical,' or 'integral.'").

2. The contracts at issue in this litigation

Section 18.15 of the eastern drilling contracts provides:

> "PDVSA" agrees to pay in United States Dollars, the portion of the price of this CONTRACT set forth in such currency, under the following conditions:
>
> a) That the deposits made by PDVSA in the accounts previously identified or in any other accounts indicated by the CONTRACTOR will release PDVSA from its obligation to pay the portion of the price set in United States Dollars to the extent of the deposits made.
>
> b) PDVSA will always have the right, at any time and at its sole discretion, to pay the portion of the price set in United States Dollars, in that currency or in bolivars at the current rate of exchange in Caracas on the date of payment. In the event that the payment is made in Bolivars and the CONTRACTOR believes it has suffered losses as a consequence of the variation in the rate of exchange applied on the date of issue of the invoice and at the rate in force on the payment date thereof, the CONTRACTOR will submit the relevant claim according to

> the provisions of Clause 18.12 of this CONTRACT.

(Dkt. No. 40-1, at 22 (§ 18.15)).

The eastern drilling contracts were later supplemented by an Agreement on June 2, 2008 (the June 2, 2008 Agreement) whereby PDVSA agreed to "pay 61% of the invoices for services rendered in the eastern region in U.S. dollars to a foreign bank account designated by H&P-Venezuela and the remaining 39% of the invoices for such services in bolivars." (Dkt. No. 22-1, at 14; *see also* Dkt. No. 40-7, at 2 (7111-2)). The PDVSA Defendants stress paragraph five of the June 2, 2008 Agreement, claiming they had no obligation to make payments in the United States because they retained an option not to do so:

> Without prejudice to all that is indicated above, the present agreement of partial payment in foreign currency shall be without effect when PDVSA deems it discretionally convenient, in accordance with its interests and considering changes in its Policies and Internal Rules.

(Dkt. No. 40-7, at 2 (¶ 5)).

Once PDVSA received an invoice from H&P-V, PDVSA had 30 days to dispute a line item before payment was due. (Dkt. No. 40-1, at 21 (§ 18.4); *see also* Dkt. No. 1, ¶ 45). The eastern region contract also reads that "in the event that PDVSA, for any reason, has not made the payments within this thirty (30) day term, the parties agree that this does not entitle them to legal actions against the other party." (Dkt. No. 40-1, at 21 (§ 18.4)). Nonetheless, until 2010, Defendants approved many invoices

requiring payment in U.S. Dollars to the Tulsa, Oklahoma bank account, pursuant to the June 2, 2008 Agreement. (*See* Dkt. No. 1, ¶ 44). In all, there were approximately 55 payments totaling $65 million to the Oklahoma bank account during the time period relevant to this litigation. (*See id.*).

Under the western drilling contract, payment was to be made in bolivars unless the foreign exchange control measures in Venezuela prevented H&P-V from exchanging local currency for U.S. Dollars, as necessary to meet U.S. Dollar obligations outside of Venezuela:

> If as a result of the exchange control measures established by the competent authorities, [H&P-V] is unable to obtain in a timely fashion the foreign currency required to perform its obligations abroad related to the performance of this CONTRACT, [Petróleo] agrees to pay in United States dollars the portion of the price of this CONTRACT set in said currency in accordance with current regulation, "Norms and Procedures for the Payment of Foreign Exchange for Construction, Goods and Services in the Western Division," for those items directly associated with the external component pursuant to the results of the corresponding audit. [H&P-V] shall indicate, for purposes of payment, the bank and account number where payments are to be made.

(Dkt. No. 40-3, at 21 (§ 18.14)).

In addition to the provisions regarding payment, particularly relevant to the direct effects analysis are

the contractual provisions requiring the procurement by H&P-V of products from American companies. For example, H&P-V had to buy transformers from a company in Fremont, Ohio (*see* Dkt. No. 40-1, at 37; Dkt. No. 39, at 64); equipment used with blowout preventers to space equipment apart from a company in Stephenville, Texas (*see* Dkt. No. 40-1, at 38; Dkt. No. 39, at 64); a top drive from a company in Erie, Pennsylvania (*see* Dkt. No. 40-6, at 36; Dkt. No. 39, at 64); a blow out preventer from a company in Houston, Texas (*see* Dkt. No. 40-6, at 42; Dkt. No. 39, at 64); hardbanding from a different company in Houston, Texas (*see* Dkt. No. 40-4, at 38; Dkt. No. 39, at 64); flanged fittings from a company in Willison, Florida (*see* Dkt. No. 40-4, at 41; Dkt. No. 39, at 64); a forklift from a company in Peoria, Illinois (*see* Dkt. No. 40-6, at 44; Dkt. No. 39, at 64); and various products from a third company in Houston, Texas (*see, e.g.*, Dkt. No. 40-3, at 35; Dkt. No. 39, at 64). (*See also* Dkt. No. 1, ¶ 124 ("H&P-V routinely entered into third-party agreements with vendors, suppliers, and services companies in the United States, for the purpose of delivering goods and services from the United States to Venezuela to permit H&P-V to perform its contracts with the PDVSA Defendants.").

3. Direct effect regarding payments to United States

The Supreme Court has addressed the meaning of "direct effect" in the context of the FSIA's commercial activities exception only once. *See Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992). In *Weltover*, the government of Argentina issued a Presidential Decree to extend the time it had to pay

certain bonds. Certain entities "refused to accept the rescheduling and insisted on full payment, specifying New York as the place where payment should be made." *Id.* at 610. As to the "direct effect" component of 28 U.S.C. § 1605(a)(2), the Court rejected the suggestion that there is a "substantiality" or "foreseeability" requirement, and stated that "an effect is direct if it follows as an immediate consequence of the defendant's activity." 504 U.S. at 618 (citation, quotation marks, and ellipses omitted). It then found a direct effect with "little difficulty" because the entities challenging Argentina "had designated their accounts in New York as the place of payment, and Argentina made some interest payments into those accounts before announcing that it was rescheduling the payments. . . . Money that was supposed to have been delivered to a New York bank for deposit was not forthcoming." *Id.* at 618-19.

Two years after *Weltover*, the D.C. Circuit decided *Goodman Holdings v. Rafidain Bank*, 26 F.3d 1143 (D.C. Cir. 1994). In *Rafidain*, two Irish corporations sought to recover payments on letters of credit from banks that were part of the Iraqi government. Previously, the banks had made installment payments on the letters "mostly from accounts in United States banks." *Id.* at 1144. The *Rafidain* court distinguished *Weltover* because "[n]either New York nor any other United States location was designated as the 'place of performance' where money was 'supposed' to have been paid . . . . Rafidain might well have paid them from funds in United States banks but it might just as well have done so from accounts located outside of the United States, as it had apparently done before." *Id.* at

1146-47 (footnote omitted). Even where there was no "'immediate consequence' in the United States from Rafidain's failure to honor the letters," the Court still found a "direct effect" in the United States under § 1605(a)(2). *Id.* Interesting to note about *Rafidain* is Judge Wald's concurrence, where she "emphasize[d] that, for an act to have a 'direct effect' in the United States, there is no prerequisite that the United States be contractually designated as the place of performance. . [E]ven absent a contractual provision mandating the involvement of U.S. banks, if the longstanding consistent customary practice between Rafidain and Goodman had been for Rafidain to pay Goodman from its New York accounts, the breach of the letters of credit might well have had a direct and immediate consequence in the United States." *Id.* at 1147 (Wald, J., concurring).

As a result of *Weltover*, Judge Wald's concurrence in *Rafidain*, and other cases, Judges on the District Court for the District of Columbia have found that our Court of Appeals has "left open the possibility that a court could find a 'direct effect' based upon a non-express agreement to pay in the United States." *Idas Resources N.V. v. Empresa Nacional de Diamantes de Angola E.P.*, 2006 WL 3060017, at *9 (D.D.C. Oct. 26, 2006) (Huvelle, J.) (quoting *Global Index, Inc. v. Mkapa*, 290 F. Supp. 2d 108, 114 (D.D.C. 2003) (Kennedy, J.)); *see also Agrocomplect, AD v. Republic of Iraq*, 524 F. Supp. 2d 16 (D.D.C. 2007) (Walton, J.) ("[T]his court need not consider whether it is necessary for parties to enter into an agreement designating a place for payment or vesting one party with complete discretion to name a place for payment contemporaneously with a

contract giving rise to a breach of contract suit . . . ."); *cf. Cruise Connections*, 600 F.3d at 666 (stating "we have no need to consider . . . whether a foreign sovereign had to have agreed to the use of a U.S. bank account," and distinguishing cases that addressed the issue in part because "none of those cases dealt with a situation like the one we face here: where the alleged breach resulted in the direct loss of millions of dollars worth of business in the United States.") But whether or not Defendants' pattern and practice of making numerous payments totaling millions of dollars to a bank in the United States constitutes a direct effect that trumps Defendants' contractual discretion to pay Plaintiffs in Venezuela in Bolivars is not necessary for this Court to decide. There is a direct effect based on third-party impacts under the contracts based on D.C. Circuit precedent.

4. Direct effect regarding third party impacts

In *Cruise Connections Charter Management 1, LP v. Attorney General of Canada*, the D.C. Circuit indicated a broad view of the direct effect test. *See* 600 F.3d 661 (D.C. Cir. 2010). In *Cruise Connections*, the Royal Canadian Mounted Police (RCMP) cancelled a contract with the American company Cruise Connections to provide cruise ship services during the 2010 Olympics. The company had subcontracted with two U.S.-based cruise lines, Holland America and Royal Caribbean. The district court found that the defendant enjoyed sovereign immunity in part because "Cruise Connections' inability to perform its contractual obligations to the third party cruise lines constituted an intervening element between RCMP's breach and the broken

third-party agreements." 600 F.3d at 664 (citation and quotation marks omitted). The D.C. Circuit reversed, finding not only that "the alleged breach resulted in the direct loss of millions of dollars worth of business in the United States," but that the "direct effect" need not necessarily harm the plaintiff. *Id.* at 666. The FSIA "requires only that the effect be 'direct,' not that the foreign sovereign agree that the effect would occur." *Id.* at 665 (citation omitted).[8]

Plaintiffs here allege an impact of the breach that is sufficiently similar to the breach found to have a direct effect in *Cruise Connections*. In *Cruise Connections*, the contract itself required the ships to come from U.S.-based companies. Relying on this fact, the D.C. Circuit found that "RCMP's termination of the Cruise Connections contract led inexorably to the loss of revenues under the third-party agreements. This is sufficient." *Id.* The material before this Court indicates that Defendants agreed to contracts with Plaintiffs that required the purchase and use of specific parts from specific U.S.-based companies. The D.C. Circuit has previously indicated that such a finding is sufficient for a finding of direct effect. Accordingly, there is a direct effect here under the meaning of § 1605(a)(2).

This accords with the D.C. Circuit's recent interpretation of *Weltover*. In *Weltover*, the Supreme Court stated: "Money that was supposed to have

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[8] Cruise Connections also claimed that lost revenue expected from on-board purchases by security personnel staying on the ships constituted a direct effect, but the D.C. Circuit found it "need not decide whether non-payment of on-board revenues qualifies as a direct effect" because it found a direct effect through other factors.

been *delivered* to a New York bank for deposit was not forthcoming." 504 U.S. at 619 (emphasis added). In *Cruise Connections*, the D.C. Circuit extended this language, finding that "[b]ecause RCMP terminated the contract, revenues that would otherwise have been *generated* in the United States were 'not forthcoming.' 600 F.3d at 665 (emphasis added). The D.C. Circuit's interpretation of *Weltover*, binding on this Court, indicates that the third party contracts at issue here, the breach of which allegedly resulted in the loss of "revenues that would otherwise have been generated in the United States," have a direct effect as that term is used in the FSIA.

5. Plaintiffs' motion to enforce

Because the issue of whether this Court can exercise personal jurisdiction over the PDVSA Defendants consistent with constitutional due process is not clearly encompassed within the Initial Issues, the question will not be answered at this time. The Joint Stipulation was forged in part to postpone any obligations by Defendants to respond to Plaintiffs' discovery requests. Yet to resolve the question of constitutional due process in this case, discovery would likely be necessary. The parties came to an agreement to avoid discovery regarding the Initial Issues, and therefore deciding this issue without permitting any discovery would conflict with precedent from the D.C. Circuit. *See El-Fadl v. Cent. Bank of Jordan*, 75 F.3d 668, 676 (D.C. Cir. 1996) ("A plaintiff faced with a motion to dismiss for lack of personal jurisdiction is entitled to reasonable discovery, lest the defendant defeat the jurisdiction of a federal court by withholding information on its contacts with the forum.").

In addition, the PDVSA Defendants both indicated that the issues of statutory direct effect under the FSIA and constitutional due process, while related, are distinct, and also acknowledged that there are elements of the analysis of constitutional due process that are tied up with issues explicitly denoted as Additional Issues. As to the former point, the PDVSA Defendants indicated in their motion to dismiss that the statutory and constitutional issues are distinct. (*See* Dkt. No. 22-1, at 32). In their reply the PDVSA again indicated the issues are, though related, distinct. (*See* Dkt. No. 43, at 31 ("[N]ot only does H&P-Venezuela fail to satisfy the direct effect requirement of the FSIA, but the assertion of jurisdiction would *also* violate the due process protections to which the PDVSA Defendants are entitled." (emphasis added; citation omitted)). While the PDVSA Defendants argue that Plaintiffs have conceded the due process issue because the issue was raised in the PDVSA Defendants' motion to dismiss and not responded to, (*see* Dkt. No. 43, at 31 n.24), this argument fails to persuade. Defendants made a number of arguments in their motions to dismiss that went unaddressed by Plaintiffs because of the Joint Stipulation. Constitutional due process is among them, and was not simply conceded.

As to the latter point, Defendants describe the constitutional argument as inextricably bound with issues that are clearly articulated as Additional Issues. (*See* Dkt. No. 43, at 10 and n.2 (stating that an assertion of jurisdiction would violate due process in part because the contracts "were negotiated and performed entirely in Venezuela [and] governed by Venezuelan law with a Venezuelan forum-selection

clause," and arguing that this issue, clearly enumerated as an Additional Issue, should nonetheless "inform this Court's determination of whether it would be reasonable to assert jurisdiction commensurate with due process"); *id.* at 32 (referencing the alleged forum selection clauses again when arguing that "jurisdiction over the PDVSA Defendants would not comport with due process" (citation omitted))).

There are yet still other reasons why the constitutional due process argument should not be considered as part of the Initial Issues. For example, the D.C. Circuit has stated that "[t]he statutory requirements for personal jurisdiction do not affect the constitutional in personam jurisdiction requirement that, pursuant to the due process clause of the Fifth Amendment, certain 'minimum contacts' must exist between the person and the jurisdiction." *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 442 n.10 (D.C. Cir. 1990). Because the D.C. Circuit has previously separated the statutory and constitutional questions, because of the need for additional discovery, because of the way the issue was briefed by the PDVSA Defendants, and fundamentally because of the language of the Joint Stipulation, this Court finds that deciding the constitutional due process argument is not proper as part of the Initial Issues.

D. Standing of H&P-IDC

Standing jurisprudence springs from two sources: Article III's case-or-controversy requirement, and judicially self-imposed, prudential limitations. *See Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11 (2004). To establish constitutional standing, a

plaintiff must demonstrate that it has suffered a concrete and particularized injury in fact, fairly traceable to the defendant's unlawful conduct, and show that the wrong is likely to be redressed by the relief sought. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Defendants do not challenge whether Article III's case-or-controversy requirements have been met, but only assert their challenge under the shareholder standing rule. (*See* Dkt. No. 22-1 at 18-20); (Dkt. No. 43 at 10-12); (Dkt. No. 44 at 29-31); *cf.* (Dkt. No. 36, at 2-3) (clarifying that the Initial Issues are derived from Defendants' motions to dismiss).

Plaintiffs concede that H&P-IDC does not have standing regarding the breach of contract claims. (Dkt. No. 39, n.26) ("Plaintiffs do not contend that H&P-IDC has standing to bring the breach of contract claims."). The only issue regarding standing, then, is whether the company has standing regarding the expropriation claim.

Plaintiffs have alleged that H&P-IDC "suffered the expropriation of an entire company without compensation," (Dkt. No. 1, ¶ 85), and that "Venezuela's expropriation of the rigs deprived H&P-IDC of its ownership and control of H&P-V depriv[ing] H&P-IDC of its subsidiary and its business as a going concern, directly impacting the operations and bottom line of H&P-IDC," (*id.* ¶ 139). Plaintiffs have not only alleged that Venezuela took H&P-V's real and personal property, but that "[t]he seizure constituted a taking of the entirety of H&P's Venezuelan business operations . . ." (*Id.* ¶ 75). Plaintiffs aver that "Defendants took the entire business, which they now operate as a state-owned commercial enterprise," and as a result "H&P no

longer . . . maintains any commercial operations in Venezuela," (*Id.* ¶¶ 81, 85).

Defendants argue that, because H&P-IDC is not a party to any of the contracts at issue, they lack standing to bring a claim. As the PDVSA Defendants argue in their Reply, "H&P-IDC's standing argument has no merit. It has not, and cannot, cite a single case in which a court has permitted a shareholder to assert an injury to its corporation, as opposed to an injury to itself, when the corporation is able and willing to assert its own rights." (Dkt. No. 43, at 8).

Particularly relevant here is the prudential restriction regarding standing referred to as the shareholder standing rule. *See Franchise Tax Bd. v. Alcan Aluminum Ltd.*, 493 U.S. 331, 336 (1990). As the Supreme Court has said, this equitable rule "prohibits shareholders from initiating actions to enforce the rights of the corporation unless the corporation's management has refused to pursue the same action for reasons other than good-faith business judgment." *Id.; see also Am. Airways Charters, Inc. v. Regan*, 746 F.2d 865, 873, n.14 (D.C. Cir. 1984) ("No shareholder—not even a sole shareholder—has standing in the usual case to bring suit in his individual capacity on a claim that belongs to the corporation."). "A basic tenet of American corporate law is that the corporation and its shareholders are distinct entities." *Dole Food Co. v. Patrickson*, 538 U.S. 468, 474 (2003). And, indeed, "[a] corporate parent which owns the shares of a subsidiary does not, for that reason alone, own or have legal title to the assets of the subsidiary." *Id.* However, shareholders may still bring an action to enforce their own individual rights, "even where the

corporation's rights are also implicated." *Franchise Tax Board*, 493 U.S. at 336. Therefore, standing for the plaintiff-shareholder depends on whether the shareholder's claim derives from the rights of the corporation or from a "direct, personal interest in [the] cause of action . . . ." *Id.*

According to the PDVSA Defendants, the shareholder standing "rule 'prohibits shareholders from initiating actions to enforce the rights of the corporation'" (Dkt. No. 22-1, at 18 (quoting *Franchise Tax Bd.*, 493 U.S. at 336)). But the word before that quote from *Franchise Tax Bd.* and omitted by the PDVSA Defendants is important: "generally." The sentence following the quote is instructive as well: "There is, however, an exception to this rule allowing a shareholder with a direct, personal interest in a cause of action to bring suit even if the corporation's rights are also implicated." *Franchise Tax Bd.*, 493 U.S. at 336.

Dole Food Co. v. Patrickson, 538 U.S. 468 (2003), also relied upon by Defendants, does not directly address this issue. As is relevant here, in *Dole Food* the Supreme Court addressed a specific question, namely "whether a corporate subsidiary can claim instrumentality status where the foreign state does not own a majority of its shares but does own a majority of the shares of a corporate parent one or more tiers above the subsidiary." 538 U.S. at 471. The Court answered no to that question, and it also noted that "[t]he veil separating corporations and their shareholders may be pierced in some circumstances . . . ." 538 U.S. at 475. Thus, *Dole Food* is not directly on point, nor does it suggest that Plaintiffs' standing argument in this case is foreclosed.

In *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500 (D.C. Cir. 1984) (en banc), the D.C. Circuit rejected an argument similar to the one offered here by Defendants regarding the standing of H&P-IDC. However, although the case supports Plaintiffs' argument about H&P-IDC's standing, it has a procedural history that Defendants suggest undercuts its precedential value. But considered together, the case and the developments that followed it suggest that Plaintiffs have the better argument.

In *Ramirez*, U.S. citizen Temistocles Ramirez de Arellano (Ramirez) was the sole shareholder of two U.S. corporations, which in turn wholly owned four subsidiaries incorporated in Honduras. Through this "chain of title," Ramirez owned "a large agricultural-industrial complex in the northern region of Honduras." 745 F.2d at 1506. The U.S. Department of Defense (DoD) seized "over half of the ranch's 14,000 acres and nearly 90% of the year-round grazing land," and the DoD's operations helped to "destroy[] the plaintiffs' investment and Ramirez's life's work." 745 F.2d at 1508. Ramirez brought an action requesting declaratory and injunctive relief for the occupation and destruction of his property and for the deprivation of property without due process. The DoD raised a standing argument very similar to the one raised by Defendants in this case, and the D.C. Circuit rejected it. The *Ramirez* majority called the standing objection "a most extreme form of fanciful thinking. It is bizarre to posit that the claimed seizure and destruction of the United States plaintiffs' multi-million dollar investment, businesses, property, assets, and land is not an injury to a protected property interest."

745 F.2d at 1515. *See also id.* at 1518 ("The fact that the United States plaintiffs do not directly hold legal title to the real property does not deprive them of a property interest in the assets nor does it defeat their constitutional claims. Ramirez has a protected property interest in the allegedly occupied property both by virtue of his status as sole shareholder of the corporation and by virtue of his possession of the land for more than twenty years.").

It is true that after the 1984 *Ramirez* decision, the Supreme Court vacated it. *See* 471 U.S. 1113 (1985). The Supreme Court's one paragraph decision vacated and remanded for reconsideration in light of legislation enacted after the D.C. Circuit issued its 1984 opinion. On remand, the Circuit did not address the standing issue, but did dismiss the case without prejudice "so as not to bar reinstatement of the suit in the event the challenged activity resumes." *See* 788 F.2d 762, 764 (D.C. Cir. 1986). Although a decision vacated by the Supreme Court does not have precedential value when vacated because of disagreement with the ruling, *see Al Odah v. United States*, 321 F.3d 1134, 1143 (D.C. Cir. 2003), such is not the case here.[9] The Supreme Court did not address *Ramirez's* discussion of standing. However, while the case is helpful to Plaintiffs, its value is somewhat obscured by subsequent developments. Other cases, however, further the argument for H&P-IDC's standing.

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[9] The 1984 *Ramirez* decision continues to be cited approvingly by the D.C. Circuit, as well as other courts. *See, e.g., Transohio Say. Bank v. Dir., Office of Thrift Supervision*, 967 F.2d 598 (D.C. Cir. 1992); *Munns v. Clinton*, 822 F. Supp. 2d 1048 (E.D. Cal. 2011).

The D.C. Circuit later recognized that a plaintiff could have standing for purposes of the FSIA expropriation exception under circumstances similar to those at issue here. *See Nemariam*, 491 F.3d 470. In *Nemariam*, the D.C. Circuit addressed the reasoning of the court in *Kalamazoo Spice Extraction Co. v. Provisional Military Government of Socialist Ethiopia*, 616 F. Supp. 600 (W.D. Mich. 1985). In its discussion of that case, the D.C. Circuit approvingly cited that court's holding that "the seizure of the controlling stockholder's interest in a corporation, triggered the [FSIA's] expropriation exception." *See Nemariam*, 491 F.3d at 478. The D.C. Circuit endorsed the *Kalamazoo* court's reasoning that "a controlling interest in the corporation's stock was no different from the corporation's physical assets under section 1605(a)(3) because '[i]n either case, the foreign state has expropriated control of the assets and profits of the corporation.'" *Nemariam*, 491 F.3d at 478 (quoting *Kalamazoo*, 616 F. Supp. at 663) (footnote omitted).

The Ninth Circuit has also come to the same conclusion regarding standing with respect to the FSIA expropriation exception. *See Siderman de Blake v. Republic of Argentina*, 965 F.2d 699 (9th Cir. 1992). In *Siderman*, the plaintiffs brought an action claiming, among other things, that the Argentine military had unlawfully expropriated an Argentine corporation that was owned by four people, three with a 33% share each and a fourth with a 1% share. *See* 965 F.2d at 703. The corporation's "assets comprised numerous real estate holdings including a large hotel in [Argentina]." 965 F.2d at 703. One plaintiff in *Siderman* was a U.S. citizen who owned a 33% share, and the Ninth

Circuit found that she had asserted a "substantial and non-frivolous" claim that her "property had been taken in violation of international law," and thus she had standing "to invoke the international takings exception." 965 F.2d at 711-12. This parallels Plaintiffs' allegations in this case, whereby the Venezuelan military seized H&P-V by physically taking its assets.[10] The *Siderman* holding suggests H&P-IDC's standing argument is even stronger, as H&P-IDC is the full owner of H&P-V, as opposed to the 33% owner as in *Siderman*.

It is generally maintained that "[t]he shareholders' essential right is to share in the profits and in the distribution of assets on liquidation in proportion to their interest in the enterprise." 1 JAMES D. COX & THOMAS LEE HAZEN, TREATISE ON THE LAW OF CORPORATIONS § 7:2 (3d ed. 2012). Thus, the complete physical seizure of a parent company's wholly-owned subsidiary, to the point of eliminating the corporation entirely (or comprehensively taking its assets and profits), deprives the parent shareholder of its "essential" and unique rights, giving rise to claims that would not belong to the corporation. Plaintiffs have alleged that Venezuela completely expropriated all the physical property of H&P-V, such that H&P-IDC no longer has commercial operations in Venezuela. Construing Plaintiffs' allegations favorably, Defendants' actions

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[10] To the extent the PDVSA Defendants are trying to distinguish between the taking of corporate assets and the taking of a corporation, the parties have stipulated that the Court is to presume the truth of well-pleaded allegations in the complaint, and Plaintiffs have alleged more than the taking of a few corporate assets—they have alleged the taking of the entire corporation. (*See* Dkt. No. 1, ¶ 85).

have deprived H&P-IDC, individually, of its essential and unique rights as sole shareholder of H&P-V by dismantling its voting power, destroying its ownership, and frustrating its control over the company. Thus, H&P-IDC has "a direct, personal interest" in the complete taking of its wholly owned subsidiary, and has standing to bring its wrongful expropriation claim.[11]

CONCLUSION

To summarize, the Court finds that H&P-V is a national of Venezuela under international law, H&P-IDC has standing to pursue the expropriation claim, Plaintiffs have sufficiently alleged a direct effect under 28 U.S.C. § 1605(a)(2), and the time is not yet ripe for a decision on whether the act of state doctrine bars Plaintiffs' expropriation claims. In addition, the issue of constitutional due process is not among the four Initial Issues, and therefore is not addressed as part of this Memorandum Opinion. Based on the foregoing analysis and the parties'

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[11] International custom has also recognized that shareholders have certain direct and individual rights in these kinds of expropriation claims:

> It is well known that there are rights which municipal law confers upon the [shareholder] distinct from those of the company, including the right to any declared dividend, the right to attend and vote at general meetings, the right to share in the residual assets of the company on liquidation. Whenever one of his direct rights is infringed, the shareholder has an independent right of action. On this there is no disagreement between the Parties.

Barcelona Traction 1970 I.C.J. at 36. Plaintiffs have listed a number of additional sources for this practice in international law. (*See* Dkt. No. 39, at 43 n.25).

Joint Stipulation, there will now be "a second phase of briefing on the motions to dismiss." (Dkt. No. 36, at 3).

Accordingly, Defendants' Motions to Dismiss (Dkt. Nos. 22, 23, and 24) are TEMPORARILY GRANTED IN PART and DENIED IN PART, and Plaintiffs Motion to Enforce (Dkt. No. 45) is GRANTED.

Date: September 20, 2013

/s/ Robert L. Wilkins
ROBERT L. WILKINS
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13-7169

HELMERICH & PAYNE INTERNATIONAL DRILLING CO. and HELMERICH & PAYNE DE VENEZUELA, C.A.,

Appellees,

v.

BOLIVARIAN REPUBLIC OF VENEZUELA,

Appellee,

PETRÓLEOS DE VENEZUELA, S.A. and PDVSA PETRÓLEO, S.A.,

Appellants.

Argued January 16, 2015
Decided May 1, 2015
Consolidated with 13-7170, 14-7008

Appeals from the United States District Court
for the District of Columbia
(No. 1:11-cv-01735)

Before: GARLAND, *Chief Judge*, TATEL, *Circuit Judge*, and SENTELLE, *Senior Circuit Judge*.

Opinion for the Court filed by *Circuit Judge* TATEL.

Opinion concurring in part and dissenting in part filed by *Senior Circuit Judge* SENTELLE

TATEL, *Circuit Judge:* The Foreign Sovereign Immunities Act (FSIA) grants foreign states immunity from suit in American courts unless one of several enumerated exceptions applies. In this case, after Venezuela forcibly seized oil rigs belonging to the Venezuelan subsidiary of an American corporation, both the parent and the subsidiary filed suit in the United States asserting jurisdiction under the FSIA's expropriation and commercial activity exceptions. Venezuela moved to dismiss on the ground that neither exception applies. The district court granted the motion as to the subsidiary's expropriation claim, but denied it in all other respects. For the reasons set forth in this opinion, we affirm in part and reverse in part. We agree with the district court that the parent corporation had sufficient rights in its subsidiary's property to support its expropriation claim. But because the subsidiary's expropriation claim is neither "wholly insubstantial" nor "frivolous"—this Circuit's standard for surviving a motion to dismiss in an FSIA case—the district court should have allowed that claim to proceed. And given that the subsidiary's commercial activity had no "direct effect" in the United States, which the FSIA requires to defeat foreign sovereign immunity, the district court should have granted the motion to dismiss with respect to that claim.

I

For more than half a century, Oklahoma-based Helmerich & Payne International Drilling Co. (H&P-IDC) successfully operated an oil-drilling business in Venezuela through a series of subsidiaries. Incorporated under Venezuelan law, the most recent

subsidiary, Helmerich & Payne de Venezuela (H&P-V), provided drilling services for the Venezuelan government. Having nationalized its oil industry in the mid-70s, Venezuela now controls exploration, production, and exportation of oil through two state-owned corporations: Petróleos de Venezuela, S.A. (PDVSA) and PDVSA Petróleo, known collectively as PDVSA. From its creation in 1975 through 2010, PDVSA depended on H&P-V's highly valuable and rare drilling rigs because they were capable of reaching depths of more than four miles. Those rigs were originally purchased by H&P-IDC and then transferred to its subsidiary H&P-V. At issue here are ten contracts executed in 2007 between H&P-V and PDVSA, each involving one of these rigs—nine in Venezuela's eastern region and one in the west. The contracts initially covered periods ranging from five months to one year, though all were subsequently extended.

Soon after signing the contracts, PDVSA fell substantially behind in its payments. By August 2008, unpaid invoices totaled $63 million. PDVSA never denied its contractual debt; quite to the contrary, it repeatedly reassured H&P-V that payment would be forthcoming. But no payments were made, and after overdue receivables topped $100 million, H&P-V announced in January 2009 that it would not renew the contracts absent "an improvement in receivable collections." Compl. ¶ 50 (internal quotation marks omitted). By November of that year, H&P-V had fulfilled all of its contractual obligations, disassembled its drilling rigs, and stacked the equipment in its yards pending payment by PDVSA.

PDVSA made no further payments. Instead, on June 12, 2010, PDVSA employees, assisted by armed soldiers of the Venezuelan National Guard, blockaded H&P-V's premises in western Venezuela, and then did the same to the company's eastern properties on June 13 and 14. PDVSA acknowledged that it erected the blockade to "prevent H&P-V from removing its rigs and other assets from its premises, and to force H&P-V to negotiate new contract terms immediately." *Id.* ¶ 63.

In the wake of the blockade, PDVSA issued a series of press releases that are central to H&P-V's expropriation claim. The first, issued on June 23, stated that "[t]he Bolivarian Government, through [PDVSA had] nationalized 11 drilling rigs belonging to the company Helmerich & Payne[], a U.S. transnational firm." *Id.* ¶ 65. A second press release, dated June 25, declared that PDVSA's "workers are guarding the drills" and that:

> The nationalization of the oil production drilling rigs from the American contractor H&P not only will result in an increase of oil and gas production in the country, but also in the release of more than 600 workers and the increase of new sources of direct and indirect employment in the hydrocarbon sector.

Id. ¶ 66. The June 25 release also "emphatically reject[ed] statements made by spokesmen of the American empire—traced [*sic*] in our country by means of the oligarchy." *Id.* ¶ 108 (alterations in original). Another press release, this one undated, stated that the nationalization would "guarantee that the drills will be operated by PDVSA as a company of all Venezuelans, . ensur[ing] the rights

of former employees of H&P, who a year ago were exploited and then dismissed by this American company, but now they will become part of PDVSA." *Id.* ¶ 109.

On June 29, more than two weeks after the blockade began, the Venezuelan National Assembly issued an official "Bill of Agreement" declaring H&P-V's property to be "of public benefit and good" and recommending that then-President Hugo Chávez promulgate a Decree of Expropriation. *Id.* ¶ 4. President Chávez issued the decree, which emphasized that "the availability of drilling equipment [such as H&P-V's] is very low both in the country and at world level, and the lack thereof would affect [Venezuela's national oil drilling] Plan." *Id.* ¶¶ 4, 19 (alterations in original). The decree directed PDVSA to take "forcible" possession of H&P-V's drilling rigs and other property. *Id.* ¶ 4. In response, PDVSA, having already taken possession of the property, issued a press release on July 2, which stated that H&P-V's rigs "are specialized drills we need for more complex sites" and "will be very useful." *Id.* ¶ 20.

That same day, Jesus Graterol, president of the Venezuelan National Assembly's Committee on Energy and Mines, criticized opponents of the nationalization for acting "in accordance with the instructions of the [U.S.] Department of State" and trying to "subsidize the big business transnational corporations, so that they can promote what they know best to do, which is war . . . through the large military industry[] of the Empire and its allies." *Id.* ¶ 105 (first alteration in original). Rafael Ramírez, Venezuela's Minister of Energy and Petroleum and

PDVSA's President, led a political rally at H&P-V's eastern site and declared:

> The company Helmerich & Payne has operated in our country for many years. Today, the Revolutionary Government took control over that company. You have been here guarding assets that now belong to the Venezuelan State. I acknowledge and appreciate your constant watch in order to protect the people's interests. Revolutionary salutation: Socialist Nation or Death. We shall be victorious!

Id. ¶ 5 (ellipses omitted). Ramírez also referred to H&P-V as an "American company" with "foreign gentlemen investors" and Venezuelan workers who would now "become part of [PDVSA's] payroll." *Id.* As Ramírez predicted, PDVSA now uses H&P-V's rigs and other assets in its state-owned drilling business.

Supposedly to compensate H&P-V for the expropriated property, PDVSA filed two eminent domain actions in Venezuelan courts. H&P-V has yet to receive service of process in the first proceeding, and the second has been stayed indefinitely. Believing that these proceedings are unlikely to result in adequate relief, H&P-V and its American parent, H&P-IDC, filed a two-count complaint under the FSIA in the United States District Court for the District of Columbia. The first count, brought against PDVSA and Venezuela, alleges a taking of property in violation of international law and asserts jurisdiction under the FSIA's expropriation exception. The second count, brought only against PDVSA, alleges breach of the

ten drilling contracts and asserts jurisdiction under the statute's commercial activity exception.

Venezuela and PDVSA moved to dismiss on the grounds that neither FSIA exception applies and that the act-of-state doctrine, under which American courts "will not question the validity of public acts (acts *jure imperii*) performed by other sovereigns within their own borders," *Republic of Austria v. Altmann*, 541 U.S. 677, 700 (2004), bars the suit altogether. Before the district court could decide this motion, the parties filed a joint stipulation in which they agreed to brief four threshold issues:

1. Whether, for purposes of determining if a "taking in violation of international law" has occurred under the FSIA's expropriation exception, H&P-V is a national of Venezuela under international law;
2. Whether H&P-IDC has standing to assert a taking in violation of international law on the basis of Venezuela's expropriation of H&P-V's property;
3. Whether plaintiffs' expropriation claims are barred by the act-of-state doctrine, including whether this defense may be adjudicated prior to resolution of Venezuela's challenges to the court's subject matter jurisdiction; and
4. Whether, for purposes of determining the applicability of the FSIA's commercial activity exception, plaintiffs have sufficiently alleged a "direct effect" in the United States within the meaning of that provision.

The district court resolved the first question in Venezuela's favor but sided with Helmerich & Payne

on the other three. Venezuela and PDVSA now appeal, reiterating arguments they made in the district court. H&P-V cross-appeals on the first question. We review de novo a district court's resolution of a motion to dismiss for lack of jurisdiction under the FSIA. *See de Csepel v. Republic of Hungary*, 714 F.3d 591, 597 (D.C. Cir. 2013). Critically, moreover, "we must accept as true all material allegations of the complaint, drawing all reasonable inferences from those allegations in plaintiffs' favor." *Id.* (internal quotation marks omitted).

II

The FSIA "establishes a comprehensive framework for determining whether a court in this country, state or federal, may exercise jurisdiction over a foreign state." *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 610 (1992). The Act provides that "a foreign state *shall* be immune from the jurisdiction of the courts of the United States and of the States," 28 U.S.C. § 1604 (emphasis added), unless one of several exceptions applies, *id.* §§ 1605-07. H&P-V and H&P-IDC invoke the expropriation exception for their takings claim. H&P-V invokes the commercial activity exception for its breach of contract claim. We address each in turn.

Expropriation Exception

This exception, contained in FSIA section 1605(a)(3), denies foreign sovereign immunity "in any case . . . in which rights in property taken in violation of international law are in issue." 28 U.S.C. § 1605(a)(3). According to Venezuela, the exception is inapplicable here for two reasons. First, as a

Venezuelan national, H&P-V may not claim a taking in violation of *international* law. Second, under generally applicable corporate law principles, H&P-IDC has no "rights in property" belonging to its subsidiary and thus lacks standing.

In deciding a motion to dismiss for lack of jurisdiction, we are mindful of the distinction between jurisdiction—a court's constitutional or statutory power to decide a case—and ultimate success on the merits. As the Supreme Court has explained, "[j]urisdiction . . . is not defeated . . . by the possibility that the averments [in a complaint] might fail to state a cause of action on which petitioners could actually recover." *Bell v. Hood*, 327 U.S. 678, 682 (1946). What plaintiffs must allege to survive a jurisdictional challenge, then, "is obviously far less demanding than what would be required for the plaintiffs case to survive a summary judgment motion" or a trial on the merits. *Agudas Chasidei Chabad of U.S. v. Russian Federation*, 528 F.3d 934, 940 (D.C. Cir. 2008). In an FSIA case, we will grant a motion to dismiss on the grounds that the plaintiff has failed to plead a "taking in violation of international law" or has no "rights in property . . . in issue" *only* if the claims are "wholly insubstantial or frivolous." *Id.* at 943. A claim fails to meet this exceptionally low bar if prior judicial decisions "inescapably render the claim[] frivolous" and "completely devoid of merit." *Hagans v. Lavine*, 415 U.S. 528, 538, 543 (1974). "[P]revious decisions that merely render claims of doubtful or questionable merit do not render them insubstantial" for jurisdictional purposes. *Id.* at 538. Applying this standard to the present case, and viewing the complaint "in the light most favorable to the

plaintiff," *Sachs v. Bose*, 201 F.2d 210, 210 (D.C. Cir. 1952), we first consider whether H&P-V has asserted a non-frivolous international expropriation claim and then ask whether H&P-IDC has "put its rights in property in issue in a non-frivolous way," *Chabad*, 528 F.3d at 941.

As to the first inquiry, the parties begin on common ground. All agree that for purposes of international law, "a corporation has the nationality of the state under the laws of which the corporation is organized," Restatement (Third) of Foreign Relations Law § 213 (1987), and that generally, a foreign sovereign's expropriation of its own national's property does not violate international law, *United States v. Belmont*, 301 U.S. 324, 332 (1937). The Supreme Court has summarized the latter principle, known as the "domestic takings rule," this way: "What another country has done in the way of taking over property of its nationals, and especially of its corporations, is not a matter for judicial consideration here. Such nationals must look to their own government for any redress to which they may be entitled." *Id.*

According to Venezuela, the domestic takings rule ends this case because H&P-V, as a Venezuelan national, may not seek redress in an American court for wrongs suffered in its home country. This argument has a good deal of appeal. Having freely chosen to incorporate under Venezuelan law, H&P-V operated in that country for many years and reaped the benefits of its choice, including several extremely lucrative contracts with the Venezuelan government. Given this, and especially given that H&P-V expressly agreed that these contracts would be governed by Venezuelan law in Venezuelan courts,

one might conclude that H&P-V should live with the consequences of its bargain.

According to H&P-V, however, this case is not so simple. It argues that Venezuela has unreasonably discriminated against it on the basis of its sole shareholder's nationality, thus implicating an exception to the domestic takings rule. In support, H&P-V cites *Banco Nacional de Cuba v. Sabbatino*, 307 F.2d 845, 861 (2d Cir. 1962), in which the Second Circuit determined that the Cuban government's expropriation of a Cuban corporation's property qualified as a taking in violation of international law. More than 90% of the Cuban corporation's shares were owned by Americans, and the official expropriation decree "clearly indicated that the property was seized because [the corporation] was owned and controlled by Americans." *Id.* This, the Second Circuit held, justified disregarding the domestic takings rule: "When a foreign state treats a corporation in a particular way because of the nationality of its shareholders, it would be inconsistent for [the court] in passing on the validity of that treatment to look only to the nationality of the corporate fiction." *Id.* (internal quotation marks omitted). Although the Supreme Court vacated this decision on other grounds, the Second Circuit later reiterated "with emphasis" its decision to disregard the domestic takings rule in the face of Cuba's anti-American discrimination. *Banco Nacional de Cuba v. Farr*, 383 F.2d 166, 185 (2d Cir. 1967).

H&P-V also relies on the most recent Restatement of Foreign Relations Law, which recognizes discriminatory takings as a violation of international law. Specifically, section 712 suggests that "a program of taking that singles out aliens generally,

or aliens of a particular nationality, or particular aliens, would violate international law." Restatement (Third) of Foreign Relations Law § 712 cmt. f. (1987). "Discrimination," the Restatement continues, "implies *unreasonable* distinction," and so "[t]akings that invidiously single out property of persons of a particular nationality would be [discriminatory]," whereas "classifications, even if based on nationality, that are rationally related to the state's security or economic policies might not be [discriminatory]" and thus not in violation of international law. *Id.* (emphasis added). The reporter's notes to section 712 cite *Sabbatino* as an example of a discriminatory taking, explaining that Cuba's express "purpose was to retaliate against United States nationals for acts of their Government, and was directed against United States nationals exclusively." *Id.* § 712 reporter's note 5.

H&P-V insists that its complaint, which emphasizes the Venezuelan government's well-known anti-American sentiment, as well as PDVSA's statements decrying the "American empire," successfully pleads a discriminatory takings claim. For its part, Venezuela urges us not to "be the first to revive the overturned Second Circuit precedent" because "there is no internationally recognized exception—based on 'discrimination' or otherwise—to the domestic takings rule." Defs.' Cross Br. 28, 30. Dated and uncited as it may be, however, *Sabbatino* remains good law. *See Farr*, 383 F.2d at 166 (affirming *Sabbatino's* discriminatory takings rationale "with emphasis"). Although "we are not *bound* by the decisions of other circuits," Dissent at 3 (emphasis added), we may "of course find the reasons given for such [decisions] persuasive,"

Northwest Forest Resource Council v. Dombeck, 107 F.3d 897, 900 (D.C. Cir. 1997) (quoting James Moore et al., *Moore's Federal Practice* ¶ 0.402 (2d ed. 1996))—especially where, as here, our circuit has yet to consider the issue. Moreover, neither Venezuela nor the dissent cites any decision from any circuit that so completely forecloses H&P-V's discriminatory takings theory as to "*inescapably* render the claim[] frivolous" and "*completely* devoid of merit." *Hagans*, 415 U.S. at 538 (emphases added). Given this, and given the Restatement's recognition of discriminatory takings claims, we believe that H&P-V has satisfied this Circuit's forgiving standard for surviving a motion to dismiss in an FSIA case.

Alternatively, Venezuela claims that even if international law recognizes discriminatory takings, "plaintiffs have failed to plead facts to support it" because "the motivation for the expropriation was Venezuela's need for H&P-V's uniquely powerful rigs." Defs.' Br. 31. As it points out, the official decrees cited only the scarcity of these powerful rigs as the reason for the expropriation. The Bill of Agreement, for example, declared H&P-V's drilling rigs necessary for Venezuela's "public benefit and good," Compl. ¶ 4, and President Chávez's decree stated that "the lack thereof would affect [Venezuela's national oil drilling] Plan," *id.* ¶ 19 (alteration in original). Based on these statements, it may well be, as the Restatement puts it, that the taking was "rationally related to [Venezuela's] security or economic policies." Restatement (Third) of Foreign Relations Law § 712 cmt. f (1987).

Other statements, however, went well beyond Venezuela's economic and security needs and could be viewed as demonstrating "unreasonable

distinction" based on nationality. *Id.* PDVSA's press release referred to the "American empire," Compl. ¶ 108, and a National Assembly member warned that opponents of the expropriation were supporting America's mission of "war[] . . . through the large military industry[] of the Empire and its allies," *id.* ¶ 105. At this stage of the litigation, where we view the complaint "in the light most favorable to the plaintiff," *Sachs*, 201 F.2d at 210, these statements are sufficient to plead a "non-frivolous" discriminatory takings claim, *Chabad*, 528 F.3d at 941.

We turn next to Venezuela's argument that H&P-IDC may not invoke the FSIA's expropriation exception because it has no rights in H&P-V's property. By its terms, the expropriation exception applies only to plaintiffs having "rights in property" taken in violation of international law. Moreover, and quite apart from the FSIA, plaintiffs must demonstrate Article III standing by asserting their "own legal rights and interests" rather than resting "claim[s] to relief on the legal rights or interests of third parties." *Warth v. Seldin*, 422 U.S. 490, 499 (1975). The "shareholder standing rule" is an example of this latter principle. Because corporations are legally distinct from their shareholders, the rule "prohibits shareholders from initiating actions to enforce the rights of the corporation unless the corporation's management has refused to pursue the same action for reasons other than good-faith business judgment." *Franchise Tax Board of California v. Alcan Aluminium Limited*, 493 U.S. 331, 336 (1990). Combining both of these principles, Venezuela argues that as a mere

shareholder, H&P-IDC has no rights in the property of its subsidiary and thus lacks standing.

In support of this argument, Venezuela relies almost entirely on *Dole Food Co. v. Patrickson*, 538 U.S. 468 (2003), an FSIA case in which the Supreme Court held that "[a] corporate parent which owns the shares of a subsidiary does not, for that reason alone, own or have legal title to the assets of the subsidiary." *Id.* at 475. This, according to Venezuela, means that "in enacting the FSIA, Congress specifically intended that basic corporate law concepts inform the interpretation of the statute," Defs.' Opening Br. 23, and thus "rights in property" must mean corporate ownership.

Contrary to Venezuela's assertion, however, *Dole Food* does not represent a wholesale incorporation of corporate law into the FSIA. The issue in that case was whether a corporate subsidiary qualified as an instrumentality of a foreign state under the FSIA where the foreign state did not own a majority of the subsidiary's shares but did own a majority of the corporate parent's shares. *Dole Food Co.*, 538 U.S. at 471. Answering that question in the negative, the Court focused on FSIA section 1603(b)(2), which defines "instrumentality" as "an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof[.]" *Id.* at 473. Given this definition, the Court refused to "ignore corporate formalities" not because the FSIA generally incorporates corporate law principles, but because section 1603(b)(2) expressly "speaks of ownership." *Id.* at 474.

By contrast, FSIA section 1605(a)(3), the expropriation exception, speaks only of "rights in property" generally, not ownership in shares. The Supreme Court's analysis of another FSIA exception is instructive. In *Permanent Mission of India to the United Nations v. City of New York*, the Court examined the FSIA's abrogation of sovereign immunity in cases involving "rights in immovable property situated in the United States." 551 U.S. 193, 197 (2007) (quoting 28 U.S.C. § 1605(a)(4)). An instrumentality of the Indian government argued that the FSIA "limits the reach of the exception to actions contesting ownership or possession." *Id.* Seeing no such limitation in the statute's text, the Court concluded that "the exception focuses more broadly on 'rights in' property." *Id.* at 198.

So too here. The expropriation exception requires only that "rights in property . . . are in issue," § 1605(a)(3), and we have recognized that corporate ownership aside, shareholders may have rights in corporate property. In *Ramirez de Arellano v. Weinberger*, for example, we considered whether an American citizen, the sole shareholder of three Honduran corporations, had a "cognizable property interest" in land owned by the Honduran corporations and seized by the United States government. 745 F.2d 1500, 1517 (D.C. Cir. 1984), *cert. granted, judgment vacated on other grounds*, 471 U.S. 1113 (1985). Whether Ramirez had property rights in the land, we held, "does *not* turn on whether certain rights which may belong *only* to the Honduran corporation may be asserted 'derivatively' by the sole United States shareholders." *Id.* at 1516. Instead, property rights depend upon whether the shareholders have "rights

of their own, which exist by virtue of their exclusive beneficial ownership, control, and possession of the properties and businesses allegedly seized." *Id.* We thus concluded that notwithstanding corporate ownership, Ramirez had property rights in the Honduran property that he "personally controlled and managed . . . for over 20 years." *Id.* at 1520. "The corporate ownership of land and property," we held, "does not deprive the sole beneficial owners—United States citizens—of a property interest." *Id.* at 1518; *see also Bangor Punta Operations, Inc. v. Bangor & A. R. Co.*, 417 U.S. 703, 713 (1974) (rejecting the argument that, in assessing standing, courts "may not look behind the corporate entity to the true substance of the claims and the actual beneficiaries").

Our dissenting colleague questions the precedential value of *Ramirez* because it was vacated by the Supreme Court on other grounds. Dissent at 4-5. But we have held that "[w]hen the Supreme Court vacates a judgment of this court without addressing the merits of a particular holding in the panel opinion, that holding 'continue[s] to have precedential weight, and in the absence of contrary authority, we do not disturb' it." *United States v. Adewani*, 467 F.3d 1340, 1342 (D.C. Cir. 2006) (quoting *Action Alliance of Senior Citizens of Greater Philadelphia v. Sullivan*, 930 F.2d 77, 83 (D.C. Cir. 1991)). Because the Supreme Court did not address *Ramirez's* holding that the shareholders had property rights in their corporation's assets, but instead vacated and remanded in light of the U.S. military's subsequent withdrawal of all personnel and facilities from the plaintiffs' land, *De Arellano v. Weinberger*, 788 F.2d 762, 764 (D.C. Cir. 1986) (en

banc) (per curiam); *see Weinberger v. Ramirez de Arellano*, 471 U.S. 1113 (1985), that holding continues to have "precedential weight," *Adewani*, 467 F.3d at 1342.

The dissent argues that even if *Ramirez* continues to have force, it "is not genuinely on point" because it concerned property rights arising from the constitution's due process clause. Dissent at 5. But as discussed above, the FSIA's expropriation exception "focuses . *broadly* on 'rights in' property," *Permanent Mission*, 551 U.S. at 198 (emphasis added), and its text imposes no limitation on the source of those rights.

Ramirez is especially persuasive in this case because H&P-IDC, like the American citizen in *Ramirez*, was the foreign subsidiary's sole shareholder. Moreover, H&P-IDC provided the rigs central to this dispute, Compl. ¶¶ 9, 129-32, and as a result of the expropriation, has suffered a total loss of control over its subsidiary, which has ceased operating as an ongoing enterprise because *all* of its assets were taken, Compl. ¶¶ 75, 81-82. Under these circumstances, H&P-IDC has "put its rights in property in issue in a non-frivolous way." *Chabad*, 528 F.3d at 941. No more is required to survive a motion to dismiss under the FSIA. *See id.* ("non-frivolous contentions" of rights in property suffice to survive a motion to dismiss).

One final point. In the district court, Venezuela urged dismissal of Helmerich & Payne's expropriation claims pursuant to the act-of-state doctrine, which "precludes the courts of this country from inquiring into the validity of the public acts a recognized foreign sovereign power committed within

its own territory." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964). The district court never reached the issue, opting instead to determine "whether subject-matter jurisdiction exists under the FSIA before deciding whether to dismiss the case under the act of state doctrine." *Helmerich & Payne International Drilling Co. v. Bolivarian Republic of Venezuela*, 971 F. Supp. 2d 49, 63 (D.D.C. 2013). Acknowledging that the district court's decision is not subject to interlocutory appeal, *see, e.g.*, *Transamerica Leasing, Inc. v. La Republica de Venezuela*, 200 F.3d 843, 855 (D.C. Cir. 2000), Venezuela urges us to exercise pendant jurisdiction over this claim. But we "exercise such jurisdiction sparingly" and are especially reluctant to do so where "an issue . . . might be mooted or altered by subsequent district court proceedings." *Id.* Here, Helmerich & Payne's expropriation claims could well fail at the summary judgment stage or following trial on the merits, thus mooting the act-of-state issue. Given this, we think it best not to exercise pendant jurisdiction over Venezuela's act-of-state claim.

Commercial Activity Exception

This brings us, finally, to H&P-V's argument that the FSIA's commercial activity exception extends to its breach of contract claim against PDVSA. This exception, contained in section 1605(a)(2), nullifies foreign sovereign immunity in any case

> in which the action is based upon a commercial activity carried on in the United States by the foreign state; *or* upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; *or* upon an act outside the

> territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

28 U.S.C. § 1605(a)(2)(emphases added). Because this case involves a contract executed and performed outside the United States, our analysis focuses on the exception's third clause—specifically, whether Venezuela's breach of the drilling contracts "cause[d] a direct effect in the United States." *Id.* A direct effect "is one which has no intervening element, but, rather, flows in a straight line without deviation or interruption." *Princz v. Federal Republic of Germany*, 26 F.3d 1166, 1172 (D.C. Cir. 1994). H&P-V alleges three such effects.

First, relying on our decision in *Cruise Connections Charter Management v. Canada*, 600 F.3d 661 (D.C. Cir. 2010), H&P-V argues that its contracts with third-party vendors in the United States, made pursuant to the drilling contracts, constitute a direct effect. In *Cruise Connections*, we found a "direct effect" where the Royal Canadian Mounted Police (RCMP) cancelled a contract with a U.S. corporation to provide cruise ships during the 2010 Winter Olympics. *Id.* at 662. H&P-V argues that just as in *Cruise Connections*, where the RCMP contract "required . . . subcontract[s] with two U.S.-based cruise lines," *id.*, its agreements with PDVSA required contracts with U.S.-based companies for various drilling rig parts. PDVSA responds that even if H&P-V subcontracted with U.S. vendors, nothing in the drilling contracts obligated them to do so.

We need not resolve this dispute, however, because even assuming that the drilling contracts required subcontracts with American companies, those contracts had no direct effect in the United States. Our holding in *Cruise Connections* rested not on the mere formation of third-party contracts in the United States, but rather on "*losses* caused by the *termination* of [the] contract with [Royal Canadian Mounted Police]." *Cruise Connections*, 600 F.3d at 664 (emphases added); *see also id.* at 666 (noting that the "alleged breach resulted in the direct loss of millions of dollars worth of business in the United States."). Here, H&P-V concedes that none of the third-party contracts was breached. Compl. ¶¶ 126-128, 135. As a result, no losses, and therefore no "direct effect," occurred in the United States.

We are unpersuaded by H&P-V's argument that its inability to renew the third-party contracts constitutes a direct effect caused by PDVSA's breach. Pls.' Br. 62. As noted above, H&P-V had already performed all of its obligations under the existing third-party contracts. Its claim of third-party loss is therefore based on expected loss from *future* contracts that H&P-V says it would have entered into had PDVSA renewed its own contracts with H&P-V instead of breaching them. But H&P-V makes no allegation that PDVSA had an *obligation* to renew its contracts. *See* Compl. ¶ 33 ("All ten contracts . . . expired at the conclusion of an agreed-upon period unless the parties agreed to an extension or an extension occurred by the contract's original terms."). Accordingly, any losses to third parties based on expected future contracts were not a direct effect of PDVSA's breach, but rather of

PDVSA's contractually permitted decision not to renew its agreement with H&P-V.

Contrary to H&P-V's argument, *Kirkham v. Société Air France*, 429 F.3d 288 (D.C. Cir. 2005), does not require a different result. *Kirkham* involved the commercial activity exception's first clause. *See id.* at 290. H&P-V invokes the exception's third clause, under which the "direct effect" in the United States must arise from the foreign state's allegedly unlawful act—here, the breach of contract. *See Republic of Argentina v. Weltover*, 504 U.S. 607, 609 (1992) (examining "whether the Republic of Argentina's default on certain bonds" had a direct effect in the United States).

Relying on the Supreme Court's decision in *Republic of Argentina v. Weltover*, 504 U.S. 607 (1992), H&P-V claims a second effect in the United States: that PDVSA made payments to Helmerich & Payne's Oklahoma bank account. In *Weltover*, Argentina had issued bonds providing for payment through a currency transfer on the London, Frankfurt, Zurich, or New York markets at the discretion of the creditor. *Id.* at 609-10. Two Panamanian bondholders demanded payment in New York, and when Argentina failed to pay, brought suit in the United States, claiming jurisdiction under the commercial activity exception. *Id.* at 610. The Court had "little difficulty" finding a direct effect because, as a result of Argentina's failure to meet its payment obligations, a contractually required payment into an American bank was not made. *Id.* at 618-19. Relying on *Weltover*, H&P-V emphasizes that both the eastern and western contracts permitted PDVSA to pay a portion of invoiced amounts in U.S. dollars into an

American bank—indeed, PDVSA ultimately paid $65 million this way. Compl. ¶ 44. As in *Weltover*, then, PDVSA's breach meant that money "that was supposed to have been delivered to [an American] bank for deposit was not forthcoming." 504 U.S. at 619. But as PDVSA points out, the contracts gave H&P-V no power to demand payment in the United States. Rather, under both the eastern and western contracts, PDVSA could choose to deposit payments in bolivars in Venezuelan banks whenever, in its "exclusive discretion" and "judgment," it "deem[ed] it discretionally convenient." Compl. ¶¶ 78, 85, 82.

This case presents facts akin to those we examined in *Goodman Holdings v. Rafidain Bank*, 26 F.3d 1143, 1144 (D.C. Cir. 1994), in which an Iraqi bank failed to pay on letters of credit, and the payee claimed that the bank's prior payments from its accounts in the United States constituted a direct effect. We rejected this contention because pursuant to the letters of credit, Iraq "might well have paid . . . from funds in United States banks but it might just as well have done so from accounts located outside of the United States." *Id.* at 1146-47 Such unlimited discretion, we concluded, meant that unlike in *Weltover*, no money was "'supposed' to have been paid" in the United States. *Id.* at 1146 (quoting *Weltover*, 504 U.S. at 608). In other words, where, as here, the alleged effect depends solely on a foreign government's discretion, we cannot say that it "flows in a straight line without deviation or interruption." *Princz*, 26 F.3d at 1172.

Finally, relying on *McKesson Corp. v. Islamic Republic of Iran*, 52 F.3d 346 (D.C. Cir. 1995), H&P-V contends that PDVSA's breach halted a flow of commerce between Venezuela and the United

States, thus causing a direct effect. McKesson, an American corporation, alleged that the Iranian government had illegally divested it of its investment in a dairy located in Iran. *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 441 (D.C. Cir. 1990). In doing so, we concluded, Iran halted a "constant flow of capital, management personnel, engineering data, machinery, equipment, materials and packaging, between the United States and Iran to support the operation of [the dairy]," thereby causing a direct effect. *Id.* at 451. H&P-V insists that the same is true here. We think not. Iran's actions in "freezing-out American corporations in their ownership of [the dairy]" had the direct and immediate effect of halting a flow of resources and capital between the United States and Iran. *Id.* By contrast, any interruptions in commerce between the United States and PDVSA flowed immediately not from PDVSA's breach of contract, but rather from Helmerich & Payne's decision to cease business in Venezuela. And, given that the contracts were for set periods of time ranging from five months to one year, there was no guarantee of future business between Helmerich & Payne and PDVSA beyond those contracts.

III

We affirm the district court's denial of Venezuela's motion to dismiss H&P-IDC's expropriation claim. In all other respects, we reverse and remand for further proceedings consistent with this opinion.

So ordered.

SENTELLE, *Senior Circuit Judge*, dissenting in part and concurring in part: I will not reiterate the facts in this controversy, as the careful opinion of the majority sets them forth in necessary detail and with inerrant accuracy. Further, I fully concur in the majority's discussion and conclusion concerning the issues related to the commercial activity exception set forth in 28 U.S.C. § 1605(a)(2). However, despite my general agreement with the majority's exposition of the facts underlying the claim for expropriation, I dissent from the conclusion that those facts bring this case within the expropriation exception set forth in 28 U.S.C. § 1605(a)(3).

As the majority recognizes, the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1604, *et. seq.*, "'establishes a comprehensive framework for determining whether a court in this country, state or federal, may exercise jurisdiction over a foreign state.'" Maj. Op. at 8 (quoting *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 610 (1992)). As the majority further recognizes, "[t]he Act provides that 'a foreign state *shall* be immune from the jurisdiction of the courts of the United States and of the States.'" Maj. Op. at 8 (emphasis in original) (quoting 28 U.S.C. § 1604). Therefore, unless the expropriation claim falls within one of the exceptions set forth in 28 U.S.C. §§ 1605-07, the district court, and derivatively this court, has no jurisdiction over the claim. The majority concludes that claim falls within the exception created by § 1605(a)(3). I disagree.

That exception permits the courts of the United States to exercise jurisdiction "in any case . . . in which rights in property taken *in violation of international law* are in issue." § 1605(a)(3) (emphasis added). The majority states, Venezuela

argues that "as a Venezuelan national, H&P-V may not claim a taking in violation of *international* law." Maj. Op. at 8 (emphasis in original). Further, "under generally applicable corporate law principles, H&P-IDC has no 'rights in property' belonging to its subsidiary and thus lacks standing," to bring this action. Maj. Op. at 8. I again look to the majority's statement of the facts which acknowledges: "All [parties] agree that for purposes of international law, 'a corporation has the nationality of the state under the laws of which the corporation is organized.'" Maj. Op. at 9 (quoting Restatement (Third) of Foreign Relations Law § 213 (1987)).

The majority further recognizes "that generally, a foreign sovereign's expropriation of its own national's property does not violate international law." Maj. Op. at 9 (citing *United States v. Belmont*, 301 U.S. 324, 332 (1937)). This principle is known as the domestic takings rule, which provides that "[w]hat another country has done in the way of taking over property of its nationals, and especially of its corporations, is not a matter for judicial consideration here. Such nationals must look to their own government for any redress to which they may be entitled." *Belmont*, 301 U.S. at 332.

Like the majority, I recognize that Venezuela's position in this litigation is that

> the domestic takings rule ends this case because H&P-V, as a Venezuelan national, may not seek redress in an American court for wrongs suffered in its home country. This argument has a good deal of appeal. Having freely chosen to incorporate under Venezuelan law, H&P-V operated in that

> country for many years and reaped the benefits of its choice, including several extremely lucrative contracts with the Venezuelan government. Given this, and especially given that H&P-V expressly agreed that these contracts would be governed by Venezuelan law in Venezuelan courts, one might conclude that H&P-V should live with the consequences of its bargain.

Maj. Op. at 10. Unlike the majority, I believe that Venezuela's position is well taken. When appellees chose to incorporate under Venezuelan law, they bargained for treatment under Venezuelan law. To extend our examination of Venezuelan law to adjudicate its fairness appears to me to violate Venezuela's sovereignty, the value protected by the FSIA.

The majority supports its extended examination with the decision in *Banco Nacional de Cuba v. Sabbatino*, 307 F.2d 845, 861 (2d Cir. 1962). While that case may stand for the proposition that the courts of the United States can examine the fairness of a foreign sovereign's expropriation, I cannot join the majority's conclusion that "*Sabbatino* remains good law" Maj. Op. at 12. Perhaps *Sabbatino* is good law in the Second Circuit, but we are not bound by the decisions of other circuits, and I do not conclude that *Sabbatino* has ever been or remains good law in the District of Columbia Circuit. I would, therefore, conclude that Venezuela's reliance on the domestic takings rule is well taken and should compel the dismissal of Helmerich & Payne's expropriation claim for want of jurisdiction.

I would further note that I differ with the majority's apparent belief that Venezuela's reliance upon *Dole Food Co. v. Patrickson*, 538 U.S. 468 (2003), is misplaced. *See* Maj. Op. at 14. The majority asserts that "[c]ontrary to Venezuela's assertion, . . *Dole Food* does not represent a wholesale incorporation of corporate law into the FSIA." *Id.* While this may be literally accurate, it is at least equally accurate that neither *Dole Food* nor any other case constitutes a wholesale rejection of corporate law. As both the majority's opinion and mine have recognized, shareholders ordinarily have no standing to assert claims on behalf of a corporation for its property.

Neither do I find compelling the majority's reliance on two cases from this circuit: *Agudas Chasidei Chabad of U.S. v. Russian Federation*, 528 F.3d 934, 940 (D.C. Cir. 2008), and *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1517 (D.C. Cir. 1984), *cert. granted, judgment vacated on other grounds*, 471 U.S. 1113 (1985). *Chabad* is authority, at most, for the proposition that "[i]n an FSIA case, we will grant a motion to dismiss on the grounds that the plaintiff has failed to plead a 'taking in violation of international law' or has no 'rights in property . in issue' *only* if the claims are 'wholly insubstantial or frivolous.'" Maj. Op. at 9 (quoting *Chabad*, 528 F.3d at 942) (emphasis in original). As the plaintiff here has, by reason of the domestic takings rule, failed to plead a "taking in *violation of international law*," *Chabad* supports rather than undermines Venezuela's motion for dismissal. 528 F.3d at 943 (emphasis added). *Ramirez* warrants no separate discussion.

I would note first that the judgment in *Ramirez* was vacated by the Supreme Court. *Weinberger v. Ramirez de Arellano*, 471 U.S. 1113 (1985). As the majority states,

> we have held that, "[w]hen the Supreme Court vacates a judgment of this court without addressing the merits of a particular holding in the panel opinion, that holding 'continue[s] to have precedential weight, and in the absence of contrary authority, we do not disturb' it." *United States v. Adewani*, 467 F.3d 1340, 1342 (D.C. Cir. 2006) (quoting *Action Alliance of Senior Citizens of Greater Philadelphia v. Sullivan*, 930 F.2d 77, 83 (D.C. Cir. 1991)).

Maj. Op. at 16. For what it's worth, I question whether the language quoted from *Adewani and Action Alliance* in fact states a *holding* of this court to the effect that we are *bound* by the reasoning of vacated opinions. Rather, each instance paraphrases language of Justice Powell quoted in a parenthetical following the quoted language from *Action Alliance*. *Action Alliance* parenthetically quoted Justice Powell as stating:

> Although a decision vacating a judgment necessarily prevents the opinion of the lower court from being the law of the case, . . . the expressions of the court below on the merits, if not reversed, will continue to have precedential weight and, until contrary authority is decided, are likely to be viewed as persuasive authority if not the governing law . . .

County of Los Angeles v. Davis, 440 U.S. 625,646 n.10 (Powell, J., dissenting) (quoted in *Action Alliance*, 930 F.2d at 83-84). In other words, the prior reasoning of the court in vacated opinions may be persuasive, even powerfully persuasive, but I question whether it is binding precedent.

Be that as it may, *Ramirez* is not genuinely on point. *Ramirez* dealt with the question of whether the shareholders of a corporation ousted by acts of the United States government had a property interest warranting due process protection under the Constitution. The *Ramirez* Court had no occasion to consider whether the statutory waiver of a foreign government's sovereign immunity encompasses the sort of second degree property interest protected against invasion by our government under the due process concepts of our Constitution.